विश्वेश्वरानन्द-भारतभारती-ग्रन्थमाला-८

Vishveshvaranand Indological Series-8

Vishveshvaranand Institute Publications—155

संपादक : (Editor) :

विश्वबन्धुः (VISHVA BANDHU),

शास्त्री (S'âstrî), M.A., M O.L. (पंजाब Pb.),
O. d'A. (फ्रांस Fr.), Kt. C. T. (इटली It.)

भारते होशिआरपुरे
वि. वै. शो. संस्थानस्य मुद्रणालये मुद्राप्य
विश्वेश्वरानन्दवैदिकशोधसंस्थान-कृते
विद्याभास्करेण शास्त्रिणा देवदत्तेन प्राकाशि

Printed at
The V. V. R. INSTITUTE PRESS
and Published for
Vishveshvaranand Vedic Research Institute
By DEVA DATTA Shastri, V. V., V. B.
at Hoshiarpur (India).

V. I. Series—8 वि. भा. ग्रन्थमाला—८

EPOCHS IN HINDU LEGAL HISTORY

[*Thesis approved for the LL.D. degree of the Dacca University*]

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होशिआरपुरे
HOSHIARPUR
विश्वेश्वरानन्द-वैदिक-शोध-संस्थानम्
Vishveshvaranand Vedic Research Institute

प्रकाशक-संकेत :
विश्वेश्वरानन्द-वैदिक-शोध-संस्थानम्,
साधु-आश्रमः (प. गृ.), होशिआरपुरं (भारते)

प्रथमं संस्करणम्, १९५८

Publishers :
VISHVESHVARANAND VEDIC RESEARCH INSTITUTE,
SADHU ASHRAM (P.O.), HOSHIARPUR (INDIA).

FIRST EDITION, 1958

Dedicated

To

My Parents

"………The legal historian must have his eye on the end of the story, and be able to pick out the beginnings of these principles and rules and institutions which have survived and are operative to-day. That is why Maitland was so effective a legal historian and by far the best editor of Year Books who has ever existed. He was master of both mediaeval and modern law, and, therefore, he was able to detect the stray dicta, the germs of ideas which had a history. We must have legal history of this kind if we are to understand the law of our own day for many obsolete rules, institutions and technicalities have gone to the making of it ; and to use Maitland's striking expression 'rule us from the graves'………"

W. S. HOLDSWORTH

"The history of jurisprudence teaches us that our present institutions did not come to us in a day, but are the result and expression of the accumulated experiences of ages. The old order, it is true, changes yielding place to the new, but it always leaves to its successor a large legacy of ideas and habits which in their turn become the nucleus of fresh acquisition, each generation leaving its mark on succeeding generation……Indeed all law may be said to be a compromise of the past and the present. Mere logical analysis, therefore, cannot give us a true interpretation of legal doctrines…………"

RASH BEHARI GHOSH

PREFACE

HEREIN the original thesis has been thoroughly revised and considerably abridged. The thesis was examined by a Board of which Dr. R. B. Pal, M.A., D.L., of the Tokyo-Trial fame was the chairman. It is divided into four Books containing fifteen chapters in all.

Book I comprises three chapters dealing with the introductory matters, such as, the importance of studying Legal History with special reference to Hindu law, Hindu law in relation to Dharma and Vyavahāra, the ancient methods of studying Hindu law and its sources.

Book II deals with the Hindu period and comprises five chapters beginning with the Dharmasūtras and ending with the earlier commentaries and Nibandhas. A separate chapter has been devoted to Kauṭilya's Arthaśāstra in view of its important place in the Hindu Legal History.

Book III deals with the Muslim period and comprises four chapters. The first chapter of this Book is a continuation of the last chapter of Book II, as all the later commentaries and Nibandhas have been examined herein. The second chapter of this Book deals with the administration of Hindu law during the Muslim period. The administration of justice by the Mughal emperors and the general principles and procedures of Islamic jurisprudence have been discussed with special reference to their attitude towards the Hindus and the Hindu system of law. In the third chapter of this Book, the history of village panchayat, as an integral part of the ancient village republic, has been discussed bearing in mind the important part played by it, in ancient and mediaeval India. Its importance also has been recognised, nay, more emphasised, even in the context of the present developments in the country. The last chapter of this Book has been devoted to those aspects of Hindu law as had been included in the judicial systems of the Maratha rulers and Maharaja Ranjit Singh, with special reference to some judgments of the 17th and the 18th centuries.

The last Book, namely, Book IV, comprises three chapters and deals with the British period and after. The first chapter of this Book has been devoted to the examination of the different instalments in which the British system of administering justice was introduced into India. The second chapter of this Book has been devoted to the examination of the extent of the influence, exercised upon the Hindu Legal History by the acceptance and application of many foreign notions and principles, not

always in keeping with the orthodox views of the Hindus. Adjudication and legislation undoubtedly played the most importnat role in this sphere. The last chapter of the thesis has been devoted to the chequered career of the Hindu Code Bill and its fragments.

Some difficulties were felt in demarcating the boundaries of the different periods in the historical development of Hindu law. In absence of any other surer guide on this point, 1100 A.D. and 1772 A.D. have been taken as the working limits when the Muslim period and the British period might be supposed to have commenced for our purpose of the Hindu Legal History. Thus, though the Mughal emperor continued to be the theoretical ruler of India upto 1858, the East India Company had already begun to effect and introduce many important judicial reforms from 1772 A.D.—shortly after the assumption of the Diwani of Bengal, Bihar and Orissa in 1765 A.D. Hence, I was inclined to fix 1772 A.D. as the time whence British influence virtually began to be felt. The boundary line between the Hindu period and the Muslim period has been fixed at 1100 A.D. almost on similar consideration. As a matter of fact, the Muslim rule was consolidated in India from the 12th century. For three or four centuries preceding this period, there was a sort of slackening in the process of the development of the Hindu Legal History.

Some quotations, as given in the original thesis, have been omitted in this book, though adequate references to their sources have been invariably given. All Sanskrit texts have been transliterated.

My indebtedness to the previous works on the subject, to the extent they were available, will be too apparent to require any specific mention.

But I shall be failing in my duty if I do not mention in this conection that the publication of my thesis in the form of the present book could not have been possible but for the never-failing personal interest and encouragement of Acharya Vishva Bandhu Shastri, to whose self-less devotion to the cause of Sanskritic studies and research, the V. V. R. Institute of Hoshiarpur (East Punjab), progressively expanding in all conceivable directions, bears an eloquent testimony.

My thanks are also due to Shri S. K. Sarkar, B.A. and Mrs. Bela Dev, M. A. who ungrudgingly helped me in preparing the index of this book.

PANJAB UNIVERSITY LAW COLLEGE,
JULLUNDUR.
SEPTEMBER 10, 1958.

U. C. SARKAR

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INTRODUCTION

The present thesis is an attempt to examine the leading epochs and the concomitant institutions and the juristic concepts and theories underlying them in the development of Hindu Law. It, by no means, promises a detailed account with precise and accurate chronology of the history of Hindu Law. Such an undertaking is not quite possible on account of the paucity of reliable data. Very few writers have hitherto attempted a Hindu Legal History in its entirety.

The discussion has all along been with reference to the original Sanskrit texts, as compared and contrasted with modern juristic conceptions of the East and the West. Though conscious of his shortcomings and limitations, as well as the difficulties, subject to which he had to work, the author thinks that the contents of his thesis are, in some respects, an original contribution to the advancement of the study of Hindu Legal History.

The author was inspired to take up this line of work by the illuminating writings of Pollock, Maitland and Holdsworth regarding the history of English law and Buckland, Sherman and Jhering regarding the historical treatment of Roman Law. Another unfailing source of inspiration has been the writings of Roscoe Pound. Needless to say, herein the author has tried to follow their methods of treatment wherever it has been possible.

The thesis has been broadly divided into three periods, corresponding to the usual divisions of the general history of India, to wit, the Hindu period, the Muslim period and the British period. Further subdivisions have, of course, been resorted to in discussing particular epochs or institutions, with their origin, growth, influence and the ultimate effect. In the first period, Hindu Law developed quite independently, without any extraneous influence, in view of the peculiar constitution of the Hindu society, which was mainly based on Varṇa and Āśrama dharma. In the second period, the growth of Hindu Law was arrested, though at the same time, there was hardly any influence of Muslim Law upon it. This may particularly be explained by the presence of the fundamental points of similarity between the basic doctrines of the two systems. In the third period, Hindu Law was greatly influenced by the principles and notions of Western Jurisprudence, not always in strict consonance with its true genius.

According to some scholars, the construction of Hindu Legal History is neither possible nor useful. Their main contention is that so far as the early period of Hindu Law is concerned, the chronology cannot be determined with any amount of certainty and that regarding the later period, specially that covered by the British rule in India, it is said that the incidents and their dates are so well-ascertainable that there is hardly any scope for historical treatment. It is difficult to accept these arguments. The mere chronology is not all. And though as a matter of fact, it is true that at the present state of our knowledge, we cannot point to any absolutely reliable data, regarding the early chronology of the Hindu Legal History, still the relative sequence of the important epochs can be ascertained within reasonable bounds. Again, regarding the later period, the mere enumeration of dates and incidents cannot be deemed sufficient for the purpose of history. The true function of a legal historian is not merely to enumerate facts and figures but to ascertain and estimate their effects in the development of the country's law. The importance of studying this aspect of Hindu Law during the British period, cannot be over-emphasised.

In this thesis, the following points have been discussed with particular attention and an unprejudiced mind, though in many places, the results of previous researches had been accepted and many inferences even in the shape of surmises could not be totally discarded.

1. With the Aryan settlement in India, an admixture of population of the Aryans and the Non-Aryans took place even in the pre-historic times, having effects and counter-effects on the different rules and customs, prevailing amongst each of these sections of the population. It has to be remembered that the term Non-Aryan cannot be used in a despicable sense; Aryans and Non-Aryans are two logically contradictory terms. In view of the Mohenjodaro relics, it is difficult to ascertain the exact nature and degree of contribution of each of these peoples to the present society and civilisation.

2. The original conception of Hindu Law was almost wholly religious and philosophical. The genesis of this juristic and theological speculation must be sought in the conception of Ṛta or Natural Order presided over by the Vedic deity Varuṇa. This also will explain the relation between law and Dharma. The more appropriate term for law is Vyavahāra and not Dharma.

3. The earliest epoch was the Dharmasūtras. The second epoch was in the shape of the Arthaśāstras of Kauṭilya and the early Dharmaśāstras of Manu and Yājñavalkya. Even to a cursory reader, the Dharmaśāstras are the true index of the Golden Age in Hindu Legal History.

4. The antiquity and excellence of Hindu Law are unchallengeable. The juristic writings of the authors of the Smritis attained a great degree of perfection at a very early date.

5. Custom played a very important part in Hindu Law, as it did with the Historical jurists of the West in the 19th century. The application of the modern methods of jurisprudence by the ancient Hindus is of special importance.

6. There was obvious influence of Brāhmaṇism in the development of Hindu Law. So also caste-system played a very conspicuous role in its administration. Subject to the peculiar institutions of caste-system and ordeals, "the rule of law" governed the ancient Hindu society. Life of a Hindu, including that of a king, was a bundle more of duties than of rights. The action of this world was believed to be rewarded or punished in the next existence according to merits.

7. Substantive Hindu Law attained greater perfection than adjective Hindu Law which was quite simple, quick and expedient in the ancient Hindu society.

8. After the Muslim conquest and the consolidation of the Muslim rule in India, the natural growth of the Hindu Law was arrested. The Hindus were governed by their own laws and that also in the sphere of civil law. Criminal law was administered by the Muslim rulers and their officers. During this period, the Hindus mostly decided their disputes by arbitrations and panchayats among themselves.

9. The British rule in India, however, gave a definite direction to the growth of Hindu Law though not always in keeping with its orthodox genius. Many foreign juristic principles were introduced into Hindu Law through legislation and adjudication under the garb of its application and interpretation. Though in a sense, Hindu Law was relatively static during the Muslim period, it became dynamic in the British period. The Hindu system of law was naturally saturated with British influence—which was not an unmixed blessing.

10. Whether the changes brought about by the British rulers in the shape of legislative Acts and decided cases were exclusively good, bad or mixed for the Hindus is a question which cannot be fully answered by Jurisprudence alone. The correct answer will depend on the approach to the question from the standpoints of religious, social and cultural sentiments. It must be remembered in this connection that with the progress and consolidation of the British rule in India, the Hindu society assumed a peculiar character, because of its contact with the Western education and civilisation.

11. The codification of Hindu Law was neither an imperative necessity nor an unmixed blessing. As a matter of fact, to an impartial observer the spirit of Hindu Code Bill and its fragments—the latter having already become the law—had been virtually for the accentuation or acceleration of the tendencies that had already been manifest in the modifications and innovations effected by the British rulers.

BOOK I

(Preliminary)

CHAPTER I

Importance of Studying Legal History with Special Reference to Hindu Law

1. Law and its nature of change

The Hindu Law of to-day is not exactly what it originally had been several years or centuries ago. No law can be such. The fate of law is change—constant change with the change in the society. Edmond Picard most aptly says, "Law is in an unceasing state of change...........It unrolls constantly like a web of cloth fed out from the monstrous loom of destiny ....In the course of evolution there may be, of course, periods of slackening, weakness, arrest of motion, but never see we death."[1] Law can hardly keep pace with the rapid and varied progress of human society. Thus Professor Holland[2] rightly remarks that the "ever-renewed complexity of human relation calls for an increasing complexity of legal detail". This has been most beautifully expressed by Sir Henry Maine in his Ancient Law[3] where he says, "Social necessities and social opinions are always more or less in advance of law. We may come indefinitely near the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the society we are speaking of is progressive. The greater or the less happiness of the people depends on the degree of promptitude with which the gulf is narrowed". By characterising law as stable what Sir Henry Maine implies is that law cannot change by itself without definite efforts or purposes. This can be most clearly understood with reference to Professor Von Jhering's theory[4] which differs from the Savigny-Puchta theory according to which law is nothing but the unconscious and passive evolution of the society. Jhering advances the teleological theory; according to him, as nothing can happen in the material world without cause, so also in the sphere of law, nothing can be effected without

1. Le droit Pur, Secs. 135-139 ; 155-157 (Translated by J. Wigmore).
2. Elements of Jurisprudence, (13th Ed.) p. 1.
3. P. 29 (Tenth Edition).
4. The Struggle for Law, 1st Ed., Chicago, 1879 ; Callaghan & Co : (Translated by J. Lalor).

a purpose or end in view. Discussing this theory of Jhering, Korkunov also says that the theory of natural development cannot explain adequately the revolutionary changes and the heterogeneous character of the natural system of law. In these respects Jhering's "Struggle for Law" has some advantages; but inspite of these advantages, Korkunov is not ready to accept the theory of Jhering without some reserve. Hence he concludes by saying that "legal development as a whole is a struggle of old law unconsciously established against new law consciously adopted". Attempts have been made at all stages of human civilisation to adapt the law to the needs and requirements of the society.[5] The perpetual gap between society and law implies that law at no time can be absolutely perfect in view of the constant change in the society. "However much we may codify," says Mr. Justice Holmes, "the law into a series of seemingly self-sufficient propositions, these propositions will be but a phase in the continuous growth."[6] This imperfect state of law and society has been humourously expressed by Socrates who remarks that until either philosophers become kings or kings philosophers, states will never succeed in remedying their shortcomings. As regards the development of law, Prof. Von Jhering further holds that the end of law is peace but the means to that end is war; thus the life of law is a struggle..............a struggle of nations, of state powers, of classes and individuals and it is that "Justice which in one hand holds the scales in which she weighs the rights, carries in the other the sword with which she executes it. The sword without the scales is brute force; the scales without the sword is the impotence of law."[7] Criticising the Savigny-Puchta theory, Prof. Von Jhering again says that "the formation of the body of principles of jurisprudence is effected by a process as unnoticed and as painless as is the formation or growth of language. The building up of the body of principles of jurisprudence calls for no strife, no struggle..............It must be admitted that law, like language, has an unintended, unconscious development or to call it by the traditional expression an organic development from within outward. To this development we owe all the principles of law which are gradually accumulated from the autonomous balancing of the accounts of the legal rights of men in their dealings with one another, as well as those abstractions, consequences and rules deduced by science from existing laws and presented by it to the consciousness. But the power of these two

5. Herbert Spencer, The Principles of Sociology, Vol. 1, Secs. 224-233.

6. The Common Law, p. 37.

7. The Struggle for Law; Chapter I, 1st Ed, Chicago, 1879 Callaghan & Co; (Translated by J. Lalor),

factors, the intercourse of man with man and science is a limited one. It regulates the motion of the stream within existing limits and even hastens it but it is not great enough to throw down the dikes which keep the current from taking a new direction. Legislation alone can do this; that is the action of the State power intentionally directed to that end and hence it is not mere chance, but a necessity, deeply rooted in the nature of the law that all thorough reforms[8] of the mode of procedure and of positive law may be traced back to legislation."[9]

2. Development of Hindu Law

There have been undoubtedly many momentous changes in the growth of Hindu Law. It is difficult to say at this stage what would have been the actual character of Hindu Law, at the present period, had it been left alone without any extraneous influences from outside.[10] But that was not to be. There was the Mahomedan conquest and there was the British conquest. These conquests exerted deep influences in the actual development of Hindu Law, not always strictly in keeping with its own genius. Nevertheless, inspite of and subject to these influences, Hindu Law has all along maintained its organic and continuous growth like the much younger system of English Law.[11] The important epochs, institutions and concepts in Hindu Law have got to be studied historically regarding their origin and development, as well as their subsequent effects, in order to correctly analyse and assess their character and appreciate the consequences produced in the later phases of history.

3. Importance of Legal History

The importance of the study of Hindu Legal History can never be over-emphasised. "Legal History", says James Mackintosh,[12] "must form a special department by itself...a separate and substantive study...for the simple reason that the genesis and growth of a country's laws deserve and require independent treatment; it cannot be adequately worked out as a mere incident in the general history. The task of the legal historian is to select from the materials of general history, the events and influences that have specially affected the development of law: political and constitutional changes, social and economic conditions, and (what is even

8. Preface of the French translation of the Struggle for Law.

9. The Struggle for Law, Ist Ed. Callaghan & Co: (Translated by J Lalor), pp. 9-10.

10. Maitland, A sketch of English Legal History, p. 23.

11. *Ibid*, pp 2-3.

12. Roman Law in Modern Practice, (Tagore Law Lectures, Calcutta University, 1933, pp. 17-28).

more fundamental) the intellectual horizon and religious beliefs of the particular people." Lord Haldane also[13] very strongly expressed his opinion as to the "hopelessness of attempting to study English law apart from the history[14] of its growth and the character of the judges who created it. It is history alone and more specially legal history which enables us not only to describe and define the political and legal institutions and ideas but also to discover the reason why they have worked and the effects which they have produced and are producing."[15] No system of law changes wholesale all at once. The advantage of legal history[16] is inestimable also in adjudging the relative merits and demerits of the old rules and institutions retained and the new conceptions and principles adopted. "Legal History", says W. S. Holdsworth,[17] "is necessary to the understanding and intelligent working of all long established legal systems for the obvious reasons: all long established legal systems must possess a background of old institutions and of all technical principles and rules sufficiently stable to give security to the ordering of the society needed by altered social needs and an altered public opinion. It is because the legal systems of Rome and England solved this difficult problem of combining stability with elasticity that they have become two of the greatest legal systems that the world has ever seen." This elasticity and this adaptibility can be seen in a very considerable degree in the writings of the ancient legal philosophers of India also. Thus Parāśara says that different laws should be applied in different ages according to the needs of the time and the society. The Hindu sages were conscious of the changes and modifications that might appear imperative for an able administration of the society as a whole.[19]

Immense has been the benefit of the Historical method of studying jurisprudence[20] and other sciences from the 19th century. This method has "proved the grave of so many theories which once clustered round the early history of institution. Reason has now taken the place of authority and evidence has been substituted for tradition and the thin veil which once

13. Address to the American Bar Association, 1913.

14. W. S. Holdsworth, Some Lessons from our Legal History, p. 7.

15. *Ibid*, pp. 3, 5.

16. Collected Legal Papers, 194, 195.

17. Some Lessons from our Legal History, p. 9.

18. I, 21.

19. There was also specification of the respective, Smṛtis which should be adopted for the different ages ; Parāśara 1, 24.

20. The Law of Mortgages in India, (Tagore Law Lectures, Calcutta University) by Dr. Sir Rash Behari Ghosh, pp. 1-2.

concealed the origin of law and society has been partially lifted up. But the greatest service which has been rendered by historical criticism is the dissipation of some of the illusions common to the whole human race, the "idola tribus" of Lord Bacon."[21] A careful study of legal history alone can clearly trace the origin, coherently follow the line of development and logically explain the apparent inconsistencies that may appear to exist in any system of law. The legal literature of the ancient Hindus commands a very vast field and the historical method alone can give some tangible result, when it is applied thereto, in a true scientific spirit, with the enormity of industry, along with a mind, free from bias and prejudice. In the words of Sir F. Pollock, "The historical method is a key to unsolve ancient riddles, a solvent of apparent contradictions, a touch-stone of sophistries and a potent spell to excorcise those phantoms of superstitions, sheeted now in the garb of religion, now (such is their audacity) of the free spirit of science itself that do yet squeak and gibber in our streets. It is like the magic sword in Mr. George Meredith's delightful tale whose power was to severe thoughts."[22]

4. Antiquity and excellence of Hindu Law

Hindu law is undoubtedly one of the most ancient systems of law and can be compared only with the oldest systems of law known to the world, to wit, the Babylonian law, the Egyptian law and the Roman law. In its height of perfection, richness of details, and wealth of juristic and philosophical speculation, Hindu law can be compared favourably and advantageously with any of the ancient systems of law. Mayne[23] does not at all exaggerate when he says, "Hindu Law has the oldest pedegree of any known system of jurisprudence and even now it shows no sign of decreptitude. At this age, it governs races of men extending from Cashmere to Cape Comorin who agree in nothing else except their submission to it. No time or trouble can be wasted which is spent in investigating the origin and development of such a system[24] and the causes of its influence." Though Hindu Law and Roman Law represent two of the earliest and the most perfect systems of law, ever known to the world, it is believed by some juristic thinkers that they also owed their origin to and were greatly influenced by the Babylonian law[25] in the earliest period of human civilisation. According to Maitland

21. Ibid, p. 2.

22. Oxford Lectures and other Discourses, p. 42.

23. Hindu Law and Usage 1st Ed. Preface.

24. Dr. Sir R. B. Ghosh. The Law of Mortgage in India, 4th Ed. p. 35.

25. The Code of Hammurabi was discovered in 1902 at Susa, the old Babylonian capital. It reveals that over 4000 years ago, Babylonia had a complete system of law and courts (See

one of the greatest German Romanists, namely, the renowned Jhering was strongly convinced that "if we would search out the origins of Roman law, we must study Babylon."[26] The same view has been shared also by French Revillout and the American Morris.[27] According to C. P. Sherman also, the earliest development of law took place in Babylon, from Babylon it went to Egypt, from Egypt to Greece and from Greece to Rome.' The Babylonian system also influenced and moulded the ancient Hindu Law as found in the institutes of Manu. "It is now beyond dispute", says Sherman "that never yet has civilisation evolved from babarism without external assistance. That Chaldaen civilisation was largely influenced in originating and shaping Egyptian civilisation is historically correct. That Egyptain civilisation in turn exercised a potent influence upon Greece is well known. That Greek civilisation served in many respects as a model of the later Roman[28] civilisation is equally true. The influence of Babylonian law travelled beyond the borders of Babylon—eastward to the law of Hindusthan specially the famous code of Manu[29],westward into Egyptian, Phoenician and Judaean law. In course of time, Egypt developed an elaborate system of private law the details of which were worked out.........The view that much of Babylonian law descended into Rome via Egypt and Greece must not be treated lightly or with disdain." This apparently historical account of Sherman is clearly open to criticism[30]—so far atleast as Roman law and Hindu Law are

Harper's English Translation of the Code of Hummurabi, king of Babylon about 2250 B. C., Chicago, 1904).

26. Maitland, Prologue to The History of English Law, 14 Law Quart. Rev , pp. 13-33.

27. For Morris, see his History of the Development of Law, pp. 11-86 ; Washington, 1909.

28. Roman Law in Modern World, Vol. I, p. 19.

29. There seems to be no truth in this assertion. It is too far-fetched to say that Hindu Law, as propounded by Manu, was moulded or even influenced in any way by the Babylonian Law. As a matter of fact,no trace of any extraneous influence could be found in the whole range of Smriti literature which was developed independently and quite in isolation by the Hindu jurists themselves alone according to the peculiar constitutions and needs of the Hindu society. Thus sacerdotalism which occupied a very prominent position in the Smritis could not be rivalled by any other literature or Law.

30. Sherman himself seems to be conscious of the weakness of his assertion as it will clearly appear from the words "... ... ... the view that much of Babylonian law descended into Rome via Egypt and Greece must not be treated lightly and with disdain. " He again has to make some amendment of his observation when he says "... ... ... But the Romans were not slavish imitators.........they transformed what they borrowed into a thoroughly Romanised produce fashioned by Roman consummate legal genius." Roman Law in Modern World, Vol. 1 p. 21.

concerned. The question of any influence of Babylonian law on the Hindu system of law can hardly arise at all. During the time when Dharma literature was composed, there could not be any possible means of very frequent intercourse either social or philosophical. An examination of the code of Hammurabi also will lend support to this contention, as there are very few points of similarity between the two famous codes of Hammurabi and Manu. Hence there cannot be any shade of doubt that the Hindu Law, specially of the Smriti age, represented by Manu and other sage-legislators, was conceived and developed exclusively and entirely by the Indian thinkers themselves. According to V. A. Smith also, the influence of Greece on India was virtually nil. He expressed himself on this point as follows : "The most extreme 'Hellenist' view is that expressed by Herr Niese, who is convinced that all the later development of India depends upon the institutions of Alexander......In order to form correct judgment in this matter, it is essential to bear dates in mind. Alexander stayed only nineteen months in India and, however, far-reaching his plans might have been,...as a matter of fact, he did nothing of the sort and within two years of his death with the exceptions of some small garrisons under Endomos in the Indus valley, the whole apparatus of the Macedonian rule had been swept away. After the year 316 B. C. not a trace of it remained. The only mark of Alexander's direct influence on India is the existence of a few coins in imitation of Greek types." (The early History of India, pp. 209-210). It is at the same time by no means unusual to see that quite similar human thoughts and institutions occur to people, absolutely independent and unconnected, due mainly to certain essential common features of human thought and nature. The observations of Dr. N. C. Sen Gupta are very instructive on this point.[30a].

The theory of Babylonian influence on Roman Law through Egypt and Greece is equally subject to crititism. The creation of Praetor Urbanus took place in 367 B.C. and the creation of Praetor Peregrinus took place in 242 B.C. The Romans conquered Greece in 146 B.C. It cannot be said by any stretch of imagination that the Romans began to be influenced by the Greek philosophy immediately after the conquest, just in a mechanical fashion. Some considerable time much have elapsed after the conquest and before the appreciation and final adoption of the doctrines of the Greek philosophy. In the meantime, the Romans undoubtedly followed their own genius and had already developed a perfect system of private law. The exact Greek influence was on the point of the Stoic philosophy in the shape

30a. Evolution of Law, pp. 11-12.

of the theory of the Law of Nature which supplied only the philosophical basis[31] of the Roman civil law whose positive ond analytical aspects had already been fully developed. There is again no reliable and sufficient evidence to show that the Greek philosophy, specially of the Stoics, was to any extent influenced by any philosophical theory of the Babylonians or the Egyptians. The influence exerted by the Stoic philosophy of the Greeks on the Romans has been depicted by Sir Henry Maine in his inimitable language[32].

It is thus historically true that the Romans conceived and developed law in the most practical sense of the term and that it was only later that they came to supply the philosophical background of the most practical conception of law.[33] Jurisprudentia originally meant the knowledge of law. From this thoroughly practical conception of jaw, the Romans rose to a far higher conception subsequently. The rudiments could already be seen in the writings of Cicero according to whom[34] study of law was derived from the depth of philosophy. Thus the ground was prepared for Ulpian's well-known definition of jurisprudence as "knowledge of things human and divine, the science of the just and the unjust." Ulpian rightly claimed for himself and other jurists that they were the "priests of justice, engaged in the pursuit of a philosophy which is truly such and no counterfeit."[35]

5. Hindu Law and Roman Law compared and contrasted

It is quite clear even to a casual reader that both the Hindu Law and the Roman Law of the earliest period of their history were exceptionally homogeneous in their origin and continuous in their development. Though at one stage, there was some influence of the Greek Stoic philosophy on the Roman Law, there was hardly any influence on Hindu Law from outside except indirectly during the British administration in India. Regarding homogeneity and continuity, both the two systems offer a good analogy for their special suitability for historical treatment. As compared with other systems, they were unique in this sense that they were very little affected by any previous system. The long and steady course of legal development among the ancient Romans and the ancient Hindus cover more than one thousand years. All that time, they pursued the even tenor of their ways without any real breach of continuity; their currents were never turned

31. Roman Law in Modern World, Vol. I, pp. 59-60.
32. Ancient Law, 3rd Ed., Chapter III, pp. 52-54.
33. For a fuller discussion, see Holland's Jurisprudence, pp. 2-3.
34. Cic de deg I. 1. 1.
35. Ulpian, Dig. I. 1. I.

aside by foreign invasion[36] and were but little disturbed by political upheavals at home. They furnish a complete panorama of legal progress; one may trace every successive phase which law can assume from the harsh and crude primitive customs up to the mature and polished systems. Early Roman Law and Hindu Law were grearly analogous not only regarding their nature and development but also regarding their influence on the other systems of law in subsequent periods. Roman Law directly influenced and to a very great extent shaped most of the legal systems of the present world. Though there could not by any direct influence of Roman Law in the early period, still the very fact that the English and Continental Jurisprudence were deeply influenced by the Roman Law evidently indicates the indirect infuence of Roman Law through the British administration of justice in India, after she had come in contact with the British rulers. "My audience," says Mackintosh,"[37] consisted almost entirely of Indian lawyers in the making, busied over many things besides Roman Law and yet liable to meet its ghost at any turn for it haunts the most unexpected places even the banks of the Ganges where it has inspired most of the law relating to rights in water." According to Jhering also Rome conquered the world three times......first by arms, second by her religion and third by her law......the third conquest being the most pacific and the most surpassing of all.[38] The Roman Law not only exerted its influence in the past, but also it is still doing so with unabated vigour even to-day. As Wheeler[39] rightly remarks that the conquest of the world by the Roman empire has passed away but the conquest of the world by the Roman Law has not passed away and there is no visible[40] sign that it will ever pass away so long as mankind endures; it rules today a wider empire than the Caesars ever knew and its empire is ever widening.[41] According to Sherman also "the law and administration are today a living force constantly employed by the jurists for constructing their own theories or demolishing those of their opponents.........Almost all the Roman Law of Justinian's

36. For Roman Law see Roman Law, in Modern practice, p. 29, (Tagore Law Lectures, Calcutta University, 1933), by James Mackintosh.

So far as Hindu Law is concerned, it was true upto the Muhammadan conquest.

37. Roman Law in Modern Practice, Tagore Law Lectures, Calcutta University, 1933, preface, p. 5.

38. Vide Brissaud, Cours d hist Gen Francai, Vol. I, pp. 192-193.

39. Commemoratier Addresses, 1905 (F. V. Reynolds), p. 2.

40. Some Lessons, from Our Legal History, p. 164.

41. Vide Tailor, The Medieval Mind, (London 1911, p. 1.)

era are still living today in the modern world[42]...........The inability of the superficial observer to discern the living Roman Law today is on account of its modern dress in place of its original Latin garb. Roman Law is now clothed in a 20th century garment of various patterns such as the Roman English Law. The past and the present are inextricably woven together."[43] Like Roman Law, Hindu Law also greatly influenced many systems of law even outside India. Java, Siam, Ceylon, Burma, Nepal are some of the many such countries.[43a] The influence of the Manu Smriti," says Kane,[43b] "spread even beyond the confines of India."

Though the legal systems of the ancient Romans and the Hindus were both very antique in character and most perfect in their devolopment, still there cannot be any doubt that the Hindu system could easily claim in certain respects at least greater perfection and more rational outlook of things. Thus Roman Law was extremely formal.[44] The right words must be said without slip or trip, the due ceremonial acts must be punctiliously performed or the whole transcation will go for naught. Similar was the case with English law as well.[45] As a matter of fact, this was the nature of almost all the ancient systems of law in the world. But Hindu Law was clearly an exception.[46] In this system of law there was never any scope for meaningless formalism which could be of any importance regarding the consequences of litigation. On the contrary, there were many sound juristic principles, enunciated and acted upon by the Hindu jurists to be accepted more or less by the other systems of law as well only after many phases of their evolution. The question of the period necessary for prescriptive right was 20 years as recognised by the Hindu sages regarding immovable property. This was ultimately the period of Roman Law also, though there

42. In the words of Lord Bryce also, "Roman Law is indeed world wide for it represents the whilom unity of civilised mankind. There is not a problem of jurisprudence which it does not touch ; there is scarcely a corner of political science on which its light has not fallen." Valedictory Roman Law Lectures at Oxford, p. 5.

43. Roman Law in Modern World, Vol. I, p. 2.

43a. Dr. Jolly's Outlines of an History of the Hindu Law, (Tagore Law Lectures, 1883, Calcutta University), p. 1.

43b. History of Dharmas'āstra, Vol. I, p. 156.

44. "So long," says Maitland, "as law is unwritten, it must be dramatised and acted. Justice must assume a picturesque garb or she will not be seen." A Sketch of English Legal History, p. 18.

45. Ibid, pp. 62-63.

46. Reason was never sacrificed for formalities. According to the directions of the Hindu jurists every case was to be tried according to its own merit when all aspects of the questions must be considered, as otherwise there was chance of doing injustice, rather than justice.

it was originally one year in case of movable property and two years in case of immovable property. Prescriptive right and adverse possession played a very important role in the juristic speculation of the ancient Hindus. Thus Yājñavalkya says, "He who sees his land being enjoyed by a stranger for 20 years and his personal chattel for ten years, without asserting his own rights loses them." According to him adverse possession must be by a stranger to the knowledge of the owner and it clearly follows that whatever the length of possession may be, it will be useless if the owner was not aware of it or being so aware did not attempt to assert his own right and resist the possession of the stranger. The author of the Mitākṣarā has very narrowly interpreted the above texts of Yājñavalkya by observing that omission to assert one's title cannot be regarded as a legitimate cause of the extinction of that title in view of the aphorism of Nārada who declares, "The king shall punish a person who enjoys another's property without any title as if he was a thief; although he may have done so for one hundred years." The authors of the Ratnākara, the Smriti Candrikā and the Smrititattva are of opinion that adverse possession does extinguish the title of the owner. According to Bhavadeva, however, adverse possession "to the knowledge of and without any opposition from the owner raises a presumption that the owner must have abandoned the property." Vācaspati, however, holds that the text of Yājñavalkya points out the risk of indifference in asserting one's title by claiming it in proper time. The doctrine of adverse possession has been discussed also by Viṣṇu, Brihaspati, Vyāsa and Raghunandana. The institutes of Viṣṇu provide that "possession for three generations make up for deficiencies of title." Brihaspati says, "He whose possession has been continued from the time of occupation and has never been interrupted for a period of thirty years cannot be deprived of such property." According to Vyāsa, "If the land of one is possessed by another for 20 years, his right to sue for possession ceases." Raghunandana, however, holds that "possession for more than 20 years perfects title by prescription. Thus in Hindu Law, the period of prescription was ultimately reduced to 20 years. Similarly in Roman Law, the original periods of prescription and adverse possession underwent several changes and ultimately they approximated the provision of Hindu Law on this point. So far as Roman Law was concerned, the period for usucapio was originally very short[47]—one year in the case of immovables within *solum italican*. But when under the legislation of Justinian, tradition took up the place of mancipatio, usucapio was superceded by prescriptio with the periods for its

47. According to the Code of Hammurabi also, adverse possession for three years could destroy the real owner's right. (See translation by W. W. Davis).

operation considerably lengthened......from one year to three years in case of movables and from two years to twenty years and ten years in the case of lands wherever situated according as the adverse possession was held against a person present in the province or absent therefrom. After this important modification, as the result of Justinian's legislation, the Roman Law of prescription very much resembled the law of prescription in Hindu Law. The juristic speculation of the Hindu legal philosophers indicates clearly the most sound and rational principles of logic and expediency.[48] There was again no inhuman and deliberate cruelty in inflicting punishment in Hindu Law, specially for civil wrongs such as non-payment of debts. But in Roman Law debtors could be legally killed and their flesh distributed among the different creditors (Twelve Tables III. 6). In Hindu Law we find the procedure of sitting "Dharna" instead which was nothing but a moral pressure brought upon the debtor to repay the debts. The Muhammadan rulers also were very drastic in the infliction of punishment on the criminals. This was thought necessary for inspiring awe and terror in the minds of the subjects so that they might not even think of rising in rebellion against the rulers. As a matter of fact, efficient administration and strong Government are not often possible by feeble policies. There were no doubt provisions in Hindu Law for capital punishment for serious and heinous crimes but there was no such punishment for civil wrongs such as non-payment of debts. Besides the Hindu jurists enunciated many wholesome[49] and helpful principles which might very well emulate the thoughts even of the most modern jurists. The characteristics of reliable and untruthful witnesses have been most beautifully described by the Hindu jurists thus: "An untruthful witness constantly shifts his position, licks the corner of his lips, his forehead sweats and his countenance changes in colour, his mouth dries up and he falters in his speech and very often contradicts himself; he does not look up, or is slow in returning answers and contorts his lips; such a person who exhibits an unnatural aspect either in mind, body, word or action is esteemed false, whether putting forward a claim on his account or giving evidence in another's cause............Reliable witnesses generally possess, the following qualities: they are religious, generous, of respectable families, addicted to veracity, lovers of virtue, candid, having offspring, wealthy,

48. Hindu Law did not enter into and conquer the different legal systems of the modern world in the same way and to the same extent as the Roman Law, it is true, nevertheless, it developed and perfected certain principles and concepts much earlier than the Roman jurists.

49. The Law of Damduput was very early enunciated in India.

conformers to traditional and written law."[50] These characteristics of witnesses have got to be remembered and emphasised even by a modern advocate in examininig and cross-examining witnesses.

On the contrary, in the Hindu Law, there were ordeals which were conspicuous by their absence in Roman Law. But there were many wholesome checks on the application of the ordeals, if any. In the first place, the ordeals were to be resorted to only in absence of human evidence : "In litigation, documents should be sought first; in absence of documents, (human) witnesses; in absence of witnesses, recourse may be taken to ordeals—this is the injunction of the wise men".[51] In the second place, ordeal could be applicable when both the parties were agreeable and when the plaintiff or the complainant declared himself ready to take the punishment himself in case of defeat.[51a] In the third place, it was practically a religious appeal and hence could not be applicable to the unbelievers, irreligious persons, Vrātyas and great criminals.[51b] Thus if the characteristics of the different ordeals are minutely examined and analysed, it will be found indirectly, that in many of them, curiously enough, the doctrine of presumption of innocence, in favour of the accused person, will be evident. In many cases again, however, there could not be any certainty about the result—the element of chance or lottery remaining predominant. It may be also mentioned here that no ordeals were mentioned in the Dharmasūtras; Manu also just alluded only to two of them; the types of ordeals were multiplied only by the later Smriti writers. This question has been more fully dealt with in connection with Yājñavalkya, Nārada and Brihaspati. Trials by ordeals were to be found in England also even up to 1819, when the Parliament abolished the last ordeals by an Act of Parliament.[52] As regards the nature and occasion for applying ordeals in trial of cases, it has been said by Maitland,—"If of two litigants, the one contradicts the other flatly, if the plain "You did" of the one is met by the straightforward "You lie" of the other, here is a problem which man cannot solve. He is unable yet to weigh testimony against testimony, to cross-examine witnesses, to

50. Vide Dr. P. N. Sen's Principles of Hindu Jurisprudence (Tagore Law Lectures); Nārada, I, 193, 196.

51. "Vivādeanviṣyate patram patrābhāve tu sākṣiṇaḥ
Sākṣyabhāve tatodīvyam pravadanti maṇīṣiṇaḥ"

It is an oft-quoted verse from the Hitopades'a, the exact authorship being unknown.

51a. See Asahāya and Nārada I, 257.

51b. Nārada, I, 332, 338.

52. Thorton's case in Maitland's Legal History, pp. 62-63.

piece together the truth out of little bits of evidence. He has recourse to the supernatural. He adjudges that one or other of the two parties is to *prove his case by an appeal to God".*[53] *Again Jus Civile and Jus Gentium* were recognised and differentiated by the Roman jurists for the governance of the different classes[54] of people—the patricians and the plebians. Jus Civile was exclusively applicable to the Roman citizens, whereas the Jus Gentium was a body of equitable principles for the administration of the foreigners. Again, the former body of law was administered by the Praetor Urbanus, whereas the latter body of rules was administered by the Praetor Peregrinus. A differentiation of the Common Law courts and the Equity courts was also necessitated and recognised in English Law. But no such differentiation was felt necessary for the genius of the Hindu jurists, thought here were two classes of people —the Aryans and the Non-Aryans, in India also. The selfsame courts and the selfsame administrators applied both what was strict law along with what might be regarded as equity. Herein lies the superiority of the ancient Hindu jurists who could be inflexible and at the same time accommodating enough to make their original law suitable to the needs of the hour in keeping with the growth and progress of the society. At the same time the stability of the broad juristic principles was by no means sacrificed.[55].

53. Ibid, p. 61.

54. In Hindu Law also there was an admixture of peoples—the Aryans and the Non-Aryans. As a matter of fact the Hindu society began with the admixture of population ultimately giving rise to the institutions of caste system which, however, played a very important part in the administration of ancient Hindu Law, both civil and criminal.

55. See Ante, S. 3.

CHAPTER II

Hindu Law in Relation to "Dharma" & "Vyavahāra"

1. Dharma—its meaning

Dharma, as it has been rightly said by P.V. Kane, is one of those Sanskrit words that defy all attempts at an exact rendering in English or any other language. It is a very elastic term like jus, recht and droit having more than one meaning. We can distinguish at least five different senses in which the term is used in popular parlance. In the first place, it means religion which is a category of theology; in the second place, it means virtue as opposed to sin or vice; in this sense it is a category of ethics; in the third place, it means law which is a category of jurisprudence; in the fourth place, it means justice and in the fifth place, it means duty. For the purpose of jurisprudence, the first two senses can be easily omitted. In elucidating the relation between Dharma, law, justice and duty, Prof. B.K. Sirkar says[1], "It is clear that Dharma is like Daṇḍa, the most awe-inspiring fact in the state's life. Daṇḍa and Dharma are indeed the two faces of the Political Janus so to speak,......the one looking to the failures, the other to the triumphs or to express the same thing in a different way, Daṇḍa is the root of a tree which flowers in Dharma." The term Dharma is clearly derived from the Sanskrit root "dhri" which means to uphold, to sustain or to nourish. In this sense, it has been used in the Ṛgveda[2]. The term Dharma passed through several transitions of meaning and ultimately its prominent significance came to be confirmed to "the privileges, duties, and obligations of man, his standard of conduct, as a member of the Aryan community, as a member of one of the castes as a person in a particular stage of life"[3]. The application of the term Dharma in the sense of Āśrama can be noticed in the Chāndogyopaniṣad[4] where it is said that there are three branches of Dharma—one consisting of sacrifice, study and charity, the second consisting of Brahmacaryya according to which an Ārya has to live in the house of his preceptor. These different branches clearly refer to the different stages or Āśrams such as those of a house-

1. The Political Institutes and Theories of the Hindus, pp. 210-1.

2. Ṛgveda, I, 187. 1 ; Ibid, X 92, 2.

3. In the very first section of his monumental work, History of Dharmaśāstra, Vol I, Kane has given encyclopaedic references to the different meanings of the term Dharma.

4. 2, 23. This passage has been discussed in the Vedānta Sūtra, III, 4, 18-0.

5. 1, 2.

holder, a hermit and a Brahmacarin. Both Manu and Yajñavalkya[6] use the term Dharma as rules for governing the different castes and stages of life. According to the Tantravartika[7], the Dharmasutras are concerned with instructions for the governance of the different Varnas and Āśramas. According to the commentaries of Medhatithi[8] on Manu, the Smritis dilate upon Dharma as fivefold. Jaimini[9] again defines Dharma as 'codanalaksnartho Dharmaḥ' that is, a desirable goal or result that is indicated by injunctive Vedic passages. According to the concluding section of the Śabarabhaṣya on the Dharmapratijña sutra[10] Dharmapratijña consists of five elements—the nature of Dharma, its definition and authority, its accessories, its non-accessories and its relation to the sacrificers and others; the first two of these are explained by the sutra referred to above and the remaining three are explained in detail in the remaining section.[11] Thus what Dharma is and what its authority is are the two questions that have been answered by the sutra referred to above—one by express statement and the other by implication.[12] Hindu Law is generally believed to have been derived mainly from the Dharmaśastras which are again supposed to have been preceded by and elaborated from the Dharmasutras[13]. The Dharmasutras are one of the threefold subdivisions of the Kalpasutra.[14] The other two types of Sutras are the Śrauta sutra and the Grihyasutra. The Śrautasutra deals with the rituals in connection with the performance of sacrifice, whereas the Grihyasutra deals with the various ceremonies to be performed and rites to be undergone by a man beginning from his birth up to his death. The third type of Sutra is the Dharmasutra which professes to be treaties on law. But strictly speaking all the different kinds of Sutras are mixed literature dealing with rituals, domestic duties and moral or legal conduct with this characteristic feature that law (positive law) is to be found only in the Dharmasutras

6. 1, 1, 7. p. 237.

8. Govindaraja on Manu II, 5 . Haradatta on Gautama XIX, 1.

9. Purvamimamsa Sutra, 1. 1. 2. 10. 1, 1, 1.

11. This Bhaṣya passage has been differently interpeted by different commentators One of the interpretations is that Codanā alone is the authority on Dharma—" Codanā Pramāṇameva.

12. To this effect the Vārtika runs as follows :

Dvayamekena sutreṇa s'rutyarthābhyām nirupyate
Svarupeapihi tasyokte pramāṇam kathyatearthataḥ."

13. It is not always correct to say that Dharmas'atras are invariably based on the Dharmasutras.

14. Kalpa is one of the six Vedangas. Vide Mecdonell's History of Sanskrit Literature, pp. 245, 262.

where also the portion occupied by law is not very considerable. Regarding the nature of Dharmasūtras and their relation with other branches of literature the observasions of Mayne[15] are very elucidating.

From the above discussion regarding the nature and origin of the Dharmasūtras and the Dharmaśāstras, and the meaning of the term Dharma used therein, it is quite clear that Dharma could not mean positive law, civil law, private or public law in the modern sense of the terms. Dharma was a term with a much wider connotation including religious, social, moral, domestic and other regulations including legal rules as well. As a matter of fact, this term was used in the most comprehensive sense to cover and regulate the conduct of an Ārya or a Hindu from all points of view. It is for this reason that in the Smriti literature we find more of social and religious than of purely legal matters. The word which actually stood for positive law in the Smriti literature is the word Vyavahāra. In the Smritis, chapters on Vyavahāra have been differentiated from the other chapters on Prāyaścitta, ācāra and the like. So, the early sages also could actually discriminate between what was pure law and what was simply religious and social law. The Smriti writers knew the distinctions between Vyavahāra or the law thy breach of which was to result in a judicial proceeding and the law or Dharma in the widest sense of the term. Yajñavalkya lays down that a violation of the rule of law or of an established usage results in one of the breaches of law.[16] Nārada explains that the practice of duty having died out among mankind, actions of law (Vyavahāra) have been introduced and the king has been appointed to decide them as he has an authority to punish.[17] The ancient Hindu jurists generally distinguished between the rules relating to religious and moral observances (ācāra and prāyaścitta) on the one hand and those relating to positive law (Vyavahāra) on the other.[18]

2. Vyavahāra—its meaning and application

The term Vyavahāra has been used in the Smritis and the commentaries in the sense of civil law, positive law, legal procedure, litigation or dispute. Thus Hārīta, as quoted in the Smriticandrikā, defines Vyavahāra as that whereby the recovery of one's own wealth and the avoidance of

15. Hindu Law and Usage, (10th Ed.) p. 21.

16. Yājñavalkya, II, 5.

17. Nārada, Sacred Book of the East Series, Vol. XXXIII, p. 5.

18. Yājñavalkya Smriti was arranged in 3 chapters, to wit, ācāra, Vyavahāra and Prāyaścitta; Nārada and Brihaspati dealt with positive law exclusively.

doing the duties peculiar to another caste or class are effected in course of law. Again according to Harīta that judicial proceeding is proper which is based on the Dharamśastras, and the Arthaśastra which is in keeping with the usages of respectable persons and which is free from fraud.[20] He also like Narada and Kauṭilya enumerates the four different aspects[21] of litigation. According to Brihaspati[22] also there are four different kinds of laws that are to be administered by the king in the decision of a case. The four aspects of Vyavahara have been differently interpreted by the different authorities.[23] In elucidating the relevant verses of Narada, Dr. Jolly[24] makes the following observation which is remarkable in more than one way: "When both parties adhere strictly to truth in their statements, there is virtue or justice clearly enough, judicial procedure, written proof and a royal edict being quite unnecessary, in that case. When either of the two parties is suspected to have made a false statement, judicial procedure has to be, resorted to which depends on the evidence given by witnesses. documentary evidence (caritra) is where statements of witnesses are consulted written in their own hands on a leaf or on berch bark or on a strip rind or some other writing material, that suit, however, which has been decided by an edict from the king himself is superior to all the rest according to the saying what has been decided in a village, goes into the town, what has been decided in the town, goes before the king, what has been decided by the king, though wrongly decided, cannot be tried anew.[25] The term Caritra has been rendered in conformity with the interpretation which is confirmed by the remarks of Caṇḍeśvara on this Śloka. The commentators explain the term Caritra in conformity with the text of Brihaspati, "Whatever is practised by a man, proper or improper, in accordance with local usage is termed Caritra". The sage Brihaspati has most fully explained, enumerated, subdivided and illustrated the different aspects

19. Svadhanasya yathā prāptiḥ, paradhanasya varjjanam,
Nyāyena yatra kriyate vyavahāraḥ sa ucyate

20. Dharmas'āstrarthas' āsroktaḥ s'iṣṭācārādilakṣaṇaḥ.
Chalena ca vyapeto yo vyavahāraḥ sa ucyate.

21. "Dharmeṇa vyavahāreṇa caritreṇa nripājñayā,
Catuṣpād vyavahāroyamuttaraḥ pūrva sādhaknaḥ.

22. 11, 18.

23. Sham-hastri, Kautilya's Arthas'āstra, p. 185; K. P. Jayswal, Manu and Yājñavalkya pp. 72-80; N. N. Law Ancient Hindu policy, pp. 122 23; Mayne, (10th Ed. pp. 7-8), Smriticandrikā, (Shankarram Shastri, pp. 149-154).

24. Sacred Book of the East, Vol. XXXIII, p. 7.

25. The different kinds of courts and their gradations with scheduled appellate powers have been described in details by Nārada in his introduction (Verse No. 7).

of litigation or Vyavahāra by as many as ten verses.[26] Each of the terms[27] Dharma, Vyavahāra, Caritra and Rājājñā can be explained more fully on the hypothesis that they represent different sources of law—literary, instrumental and material—in the modern senses of the terms. From the above references and discussions, it is abundantly clear that the conception of positive or civil law in the modern sense of the terms occupied a prominent position in the juristic speculation of the ancient Hindu sages in the shape of Vyavahāra—which was contrasted with and differentiated from the more comprehensive body of religious and social rules. In the Dharmasūtras representing the earliest Smriti epoch, the treatment of civil laws and religious and social laws was not differentiated in any marked degree, as the little civil law that is come across therein is scattered all over the Dharmasūtras; but Manu and Yājñavalkya along with others of the earlier Dharmaśāstra epoch devoted separate chapters on Vyavahāra in their discussions which, as it has already been noticed, were rather all-comprehensive dealing with all the conceivable aspects of the Hindu life; but with the later Smriti writers, such as Nārada and Brihaspati, the culmination of the process of differentiation took place where it is seen that they devoted their entire works to the speculation of the nature and application of Hindu positive law.[28] Nārada went to the length of declaring the superiority of Vyavahāra to Dharma—"Vyavahāro hi balavān dharmas-tenavahīyate." Though originally distinguished and ultimately exclusively separated from Dharma or religion, the positive law of the Smritis, could not absolutely get rid of the religious influence even in its actual administration of the Hindu society. Of course, some more rational elements were introduced in the more recent Smritis; but even in them also, the religious element did not entirely die out. In this connection it must have to be remembered that the two institutions of caste (Varṇa) and Āśrama (different stages of life) played the most important part in moulding and developing the Hindu society. As a matter of fact, the whole of Hindu Dharma came to be known as the "Varṇāśramadharma." i.e., the religion chiefly based on Varṇa and Āśrama.[29] As between these two again Varṇa or

26. Brihaspati, II, 18-27; Sacred Book of the East, Vol. XXXIII p. 285.

27. The relative superiority of the different Vyavahāra pādas have been equally insisted on by all the ancient Hindu jurists giving the highest authority to the king.

28. There were clearly two epochs in the history of the Dharmaśāstras. The earlier epoch was mainly represented by Manu and Yājñavalkya, whereas the later epoch was represented mainly by Nārada and Brihaspati. The differentiation was based on the more developed and more perfected juridical thoughts of the later legal philosophers.

29. According to the Tantravārtika, the Dharmasūtras are concerned with imparting

caste exerted by far the greater influence. The reasons were not far to seek. Āśrama concerned the attainment and development of an individual in his private life. Thus whether a man would study the Vedas or enter into married life—these were questions which concerned more the individual than the society or the king or the state. So far as Āśrama was concerned, the duty of the king was perhaps only indirect in the sense that anybody inclined to observe the different stages must not be allowed to be disturbed by any other individual or force. A much greater responsibility was, however, enjoined on the king to observe the different rights and liabilities of persons belonging to the different castes. In the Dharmaśāstras dealing with the Vyavahāra portions, we scarcely find any reference to the Āśrama, but such references abound, so far as the question of caste is concerned. An analogy may be drawn on this point between Āśrama and Varṇa on the one hand and civil and criminal law on the other regarding the share or extent of responsibility on the part of the state. A king or a state could afford to pay less heed to civil wrongs which would injure only the subjects per se; but it would not be possible for a king or state to ignore or overlook the crimes which would ultimately affect the very state itself. From the standpoint of the king, therefore, Āśrama was of lesser importance of the two, viz., Āśrama and Varṇa.[30] The philosophy of caste restriction had a very important bearing on ancient Hindu Law—both civil and criminal. In fact, there was hardly any topic which was not influenced by the consideration of the caste. The gotra,[31] adoption, marriage,[32] determination of the amount of interest, realisation of debts, infliction of punishment for crimes,[33] distribution of treasuretrove, veracity of witnesses,[34]

instruction on the Dharma of Varṇa and As'-rama—Sarvadharmasūtrāṇām Varṇās'ramadharmopades' itvāt p. 237.

30. The sages approached Manu for imparting instruction on Dharmas or rules of the different castes and As'rams. (Manu 1, 2; Yājñavalkya 1, 1)

31. The twice-born classes alone have gotras; the S'ūdras are said to have no gotra of their own. They follow that gotra of their preceptor.

32. According to Nārada, a Brahmin may marry three wives of different castes in the direct order of the caste; and so a S'ūdra woman is allowed to take a husband from any of the three higher castes. Nārada approves Anuloma marriage but is silent about Pratiloma marriage. (Nārada II, 5).

According to Manu, a S'ūdra woman cannot be the first wife of a twice-born man; he also discourages a Brahmin's marriage with a S'ūdra woman, as a Brahmin sinks to hell thereby. (Manu III, 12 24),

33. According to Nārada, a S'ūdra insulting a member of the twiceborn class, with gross invective shall have his tongue cut out, on account of his low origin; if he refers to their caste or name by way of indicating contempt, an iron-rod ten fingers long shall be thrust red-hot in to his mouth (Nārada, XV, XVI, 22-XVI, 22-27 Manu, VIII, 267-270).

34. Manu, VIII, 80, 123; Nārada, I, 199. Brihaspati, however, does not make any

appointment of judges,[35] infliction of capital punishment, application of the ordeals—not to multiply topics—were all more or less determined with reference to the question of caste in Hindu Law. In the dawn of Indian civilisation, the difference of castes seems to have been unknown and it was introduced and stereotyped artificially in a later stage. In the Ṛgveda[36] it has only once been mentioned that there were four castes and that the different castes originated from the different limbs of Puruṣa who had one thousand eyes, one thousand feet and so forth. The enumeration of the four different castes stereotyped in later literature—both religious and secular—is thus come across only once in the Ṛgveda and that also in the Puruṣa hymn of the tenth Maṇḍala which is supposed by scholars to belong to a much later period. It is quite natural that in subsequent periods along with the growth of several other artificial social restrictions, caste system also became a deep-rooted institution in the Hindu society.

3. Law and Ṛta

The ancient Hindu Law is said to be of divine or religious origin. This origin must be sought in the earliest conception of Ṛta, as we find in the Ṛgveda according to which the sages conceived the natural phenomena as Gods and invoked[37] them as such. They also noticed an order, uniformity and regularity existing in Nature. Varuṇa was the presiding deity of this Ṛta or Order. For their own conduct also, the Ṛgvedic poets conceived that some orders and rules were implanted by God. Any transgression thereof was to be punished by Varuṇa through the infliction of the disease dropsy. Thus says Macdonell,[38] "While Indra is the great warrior, Varuṇa is the great upholder of physical and moral order (Ṛta). The hymns addressed to him are more ethical and devout in tone than any others. They form the most exalted portion of the Veda often resembling in character the Hebrew Psalms. As a moral governor, Varuṇa stands far above any other deity. His wrath is roused by sin, which is the infringement

discrimination of caste with reference to a witness (VII, 22).

35. According to Manu, a Brahmin who subsists only by the name of his caste or who merely calls himself a Brahmin, though his origin is uncertain, may at the king's pleasure interpret the law to him, but never a S'ūdra (Manu, VIII, 20-21).

36. Ṛgveda, X, 90.

37. In the Ṛgveda, there was little or no scope for elaborate ritualism or priesthood. Gods were often invoked direct and their blessing solicited without any elaborate sacrerdotal rites or ceremonies which were conceived and developed only in the later epochs.

38. History of Sanskrit Literature, pp. 75-76.

of his ordinances, and which is severely punished[39]. The fetters with which he binds sinners are often mentioned. A dispeller, hater and punisher of falsehood, he is gracious to the penitent. He releases men not only from *the sins which they themselves commit but also from those committed by their fathers.* He spares the suppliant who daily transgresses his laws and is gracious to those who have broken his ordinances by thoughtlessness. There is in fact no hymn to Varuṇa in which the prayer for forgiveness of guilt does not occur." On the analogy of this moral sovereignty of Varuṇa was later on conceived the earthly sovereignty of the king who was entrusted with the maintenance of law and order in the society. Daṇḍa was to be exercised by the king. But he was equally subject to punishment in case of transgression. It was thus believed that Hindu Law was of divine origin binding the king and the subjects alike. The king and the Brahmins, on the contrary, were to be punished more heavily than other ordinary offenders on account of their more exalted political and social position.[40] Not to speak of the kings alone, the judges[41] also according to ancient Hindu Law could not go unpunished on account of wanton and negligent judgments, if any. Thus the kings and the judges also were not above the law and as such they could not claim any immunity from the operation of the law of the country. The doctrine of the "rule of law" was thus recognised in its most perfect application.

The moral sovereignty of Varuṇa and his nature to punish the sinners and offenders, referred to above, can be noticed pre-eminently even in the different Dharmmsūtras and Dharmaśāstras almost invariably. Thus Manu says, that he who gives false evidence is firmly bound by the fetters of Varuṇa and becomes helpless for one hundred existences; but false evidence might be given by a witness only for saving the life of a man, be he a Brāhmin, Kṣatriya, Vaiśya or a Śūdra. But in that case also, the witness has to offer clarified butter to the fire praying to Varuṇa for untying his fetters. Again Manu says that Varuṇa is the lord of punishment for he holds sceptre even over kings.[42] Nārada also says that a witness

39. In story of S′unaḥs′epa, in the Aitareya Brāhmaṇa, (II, 7) we find that the king Haris′candra was punished by Varuṇa with the infliction or dropsy on account of his non-fulfilment of contract to sacrifice his own son. Ultimately with the prayer of S′unaḥs′epa the king recovered.

40. Introduction by Dr. S. K. Aiyangar to "Hindu Administrative Institutions by V.R.R. Dikshitar, pp. 32-33. See also Viṣṇu, III, 70; Kauṭilya's Arthas′astra, I, 29.

41. N. N. Law, Studies in Ancient Hindu Polity, P. 135. Though it is not quite clear who tried the judges for their misconduct, still there are some indications to show that the king or his associate judges tried them.

42. Manu, VIII, 82, 106, IX, 244.

who wavers in giving evidence is sure to be fettered with a thousand bonds from the chain of Varuṇa.[43] These references go to show that the origin of the Hindu conception of law must be traced to Varuṇa's Ṛta.

4. The story of Śunaḥśepa in connection with Varuṇa

In the story of Śunaḥśepa in the Aitareya Brāhmaṇa (chapter III, Book II), we find that one king Hariścandra is praying to Varuṇa to be blessed with the gift of a son whom when given to him, he promises to sacrifice to the selfsame deity Varuṇa. The wisdom of this prayer, of course, can hardly be appreciated. The king perhaps out of blind affection is praying for a son and at the same breath he is promising to the God to sacrifice the very son to be obtained. If he has got to sacrifice the son to the God, what then is the utility of being given the son at all? And from the subsequent conduct of the king Hariścandra, we find that he was too affectionate to sacrifice his own son, as he put off the sacrifice of his son from day to day. It is really very interesting to note how the king Hariścandra deferred the sacrifice of his son.

The significance of the promise of sacrificing the very boy to be obtained by hard penances and severe austerities can be easily understood by that section of the Hindu population which is influenced by the popular superstition that the appearance of a man without a son is inauspicious to look at so much so that a person seeing the face of such a sonless man in the morning is afraid that he would not be able to procure his meals for that day.

To this very king Hariścandra, the sage Nārada characterised the importance of a son thus: by the birth of a son, a father pays his debts to his forefathers and becomes immortal; the pleasure of having a son is simply incomparable; in the son the father's self is born and it is the son that takes his father to the other shore; a son is like a light in the highest heaven, though daughters cause nothing but misery.

5. The different methods of studying jurisprudence as applied by the ancient Hindu jurists

The question is sometimes asked as to how far, if at all, the different methods of studying jurisprudence, as they are conceived to-day by the European and the American jurists, can be said to have been recognised and applied by the ancient Hindu jurists. In the evolution of the Western

43. Nārada, I, 204; see also Gautama, XXV, 79. Āpastamba, 1, 9, 27, 7; Baudhāyana, IV, 3; Kauṭilya, IV, 13.

juristic thought, divinity, religion, reason, custom and command of the sovereign played their parts in the successive epochs beginning from the Greek philosophers of the 5th century B. C. and ending with the 19th century conception of law as the command of the sovereign or the state as enunciated by Austin, Holland and the Neo-Austinians.[44] The tendency of the 20th century juristic thought is towards sociology, comprehending the whole organic growth of the human society. Roscoe Pound in his small but most pregnant treatise "Law and Morals" has summarised the different stages of development of the juristic speculation in a masterly way.[45] But all these epochs are to be seen in the history of the Hindu legal philosophy. Thus one of the modern eminent Hindu jurists rightly observes: "Hindu juristic theories had, in fact, passed through almost all the phases which characterised the various stages of the juristic history of Europe and Anglo-America since the dawn of civilisation and moreover had reached in its most developed form a synthesis which has not yet been attained in the modern world."[46] The same jurist further observes, "the theological jurisprudence of the Middle Ages was succeeded by the philosophical school of the 17th, the 18th, and the 19th century; and those in their turn, were superseded by the Analytical, Historical and the Positivist schools with materialistic ideas. The successive changes were not one smooth and and easy development but had a *zigzag* course resulting from the action and reaction of opposite forces and ideas......The unified jurisprudence of the twentieth century has already taken shape under the style of Sociological jurisprudence. The imperative idea of the Analytical jurists with their sure reliance on the efficacy of conscious law-making was superseded by the fatalistic doctrines of the Historical and the early Positivist School, but has again reappeared in a finer form in Wundt and Jhering. Even a long exploded "Law of Nature" has returned in a modified from in Stammler."[47] The earliest theological counter-part of the Greek juristic philosophy can be clearly seen in the ancient Hindu belief that law was of divine origin. As a matter of fact, religious belief permeated the entire thought of the early Hindu thinkers. Law was to be regarded as of divine

44. In regarding law as the 'commands of the sovereign' to the subjects, Austin gave countenance to the inference that law was the arbitrary creation of the ruler. But this according to the Neo-Austinian school, as Prof. Jethro Brown would call it, is a mistake. A law according to them is a command not of the ruler but of the state embracing both the ruler and the ruled.

45. Pp. 12-14; 16-17.

46. K. Basu, Modern Theories of Jurisprudence, (Tagore Law Lectures, Calcutta University, 1921) Foreward, pp. 6-7.

47. Ibid, p. 14.

origin in the sense that it was ultimately supposed to be based on the Śrutis or the Revelations. The Smritis again were regarded as authoritative because they were supposed in their turn to have been based on the Śrutis. The law, divine as they were believed to have been, had to be respected and observed, as otherwise divine wrath and punishment would be the consequence. This religious and divine origin of Hindu Law can be traced to the conception of Ṛta over which Varuṇa was regarded as the presiding deity.[48] The king also has got to be strictly dutiful, as otherwise he himself would be punished. There was undoubted supremacy of the rule of law which was binding on the rulers and the ruled alike. The status of the ancient Hindu king[49] was conceived as a bundle more of duties than of rights. The ancient Hindu kings were not only to be responsible for their own deeds, but they had to be accountable also for any transgression perpetrated by any other man within their administration. This idea has been very effectively illustrated by an episode described in the "Uttara Rāmacarita", a Sanskrit drama, written by Bahvabhūti. During the reign of Rama, in Ayodhya, a Brahmin lost his young son ; the Brahmin came to the king and demanded why his young son had died a premature death. There must have been, as alleged by the Brahmin, something wrong with the king or his administration. The king Rama also could not summarily dismiss the Brahmin. He sent his emissaries to enquire what the transgression might have been. It was, however, found on enquiry that a Śūdra was seen practising penance against the injunction of the scriptures. It was concluded that the penance practised by the Śūdra was the cause of the death of the Brahmin's son.

Reason or rationality also played a very important part in the growth of Hindu legal philosophy. Reference may be made to the expression. "ātmastusti", "svasya ca priyamātmanaḥ" etc. These expressions have no doubt been differently interpreted by the authors of the Śāstras including the writers on Mīmāṃsā; but the fact remains that the religious belief in the existence and the obligatory character of law of the ancient Hindus could not be based absolutely on superhuman belief completely devoid of reason. Whenever it was found necessary to apply reason, to come to a conclusion in respect of the adoption of a particular course of action, the sages did not hesitate to make sufficient room for the application of reason according as the circumstances of the case required it. The provisions of the śāstras had to be supplemented by and seasoned with reason and the

48. See discussion of Law and Dharma, 1, (ante).

49. The king was to be punished both according to the religious as well as the secular laws.

principles of justice, equity and good conscience. Both Nārada and Brihaspati warn by saying that legal decisions should not be made merely on the basis of the Śāstric injunction when they are devoid of reasoning ; such decisions might give rise to injustice rather than justice. Reference in this connection is made to the story of Māṇḍavya who was wrongly adjudged to be a thief on account of the lack of a careful consideration of all the relevant facts and circumstances. Again the philosophical aspect of the early Hindu juristic thought is clearly visible when it is found that almost all their rules are shaped in the form of "should" or "should not". For this it has been often said that Hindu Law was never actual law in the modern sense of the term, but that it was only a moral code giving directions as to what should be done and what should not be done. This philosophy is but one of the various aspects of the juristic speculation of the ancient Hindus. At the same time there was a very happy compromise between this philosophical method of thought with the Analytical method of thinking[50] by the ancient Hindu jurists. Thus from the provision of the Smritis regarding the administration of justice in the ancient Hindu society, it was clear that rightly or wrongly the Smritis were regarded more or less like our modern codes. Just as a modern advocate, while arguing a case before any court of justice of to-day principally confines himself to the discussion of the law, as it is, without dilating very seriously about its past condition or future improvement, so the kings of the ancient society also would treat the provisions of the Dharmasūtras and Dharmaśāstras, as they were and they would try to administer them as such without any comment or deviation. This fact clearly illustrates the Analytical way of thinking by the ancient Hindu jurists. The Historical school in the West flourished as a revolt against the philosophical school which influenced the minds of the Western people of the 16th, the 17th and the 18th centuries. Custom is the true type of law according to this school. But the importance of custom engaged the attention of the ancient Hindu jurists also much earlier. As a matter of fact, the scope of recognising the force of custom was very great, so much so that sometimes the question was as to how far, if at all, the customs or usages might be supposed to be superceding the express provisions of the Śrutis and the Smritis.[51] The writers of the Mīmāṃsā propounded a very significant theory that custom was the lost or forgotten Smriti or Śruti. Whatever might be the net value of this theory, based as it is on a fiction, there is hardly any doubt that a sort of religious colour-

50. According to Prof. Clarke, the Historical and the Analytical schools arose by way of revolt against the Philosophical school.

51. Yājñavalkya, II, 17-18, 21 ; Manu II II, 12; Devala, as cited in Parāś' aramādhavya.

ing was being attempted to be given to the origin and character of even secular customs and usages. Again the theory of the lost Smriti presupposes that the law as embodied in the Śrutis of the Smritis were complete and exhaustive. Such a theory is quite untenable from the historical point of view. No people could begin laws at the earliest stage of the society with a complete code—exhaustive and self-sufficient. For obvious reasons, a long period must have passed in every country and with every people in order to make them fit for codification—its conception and execution.[52] The importance of custom in Hindu Law was greatly exaggerated by the Privy Council when it said that "Clear proof of usage will outweigh the written text of Law"—(12 Moore's Indian Appeals, 397). The decision in this case was greatly influenced by the views of the Historical school of the 19th century. As a matter of fact, on account of the British administration in India, all the important juristic speculation of England was largely reflected in the Indian decisions as well. Another consideration of far reaching consequence is that in the ancient Smriti literature there was a serious blending of the legal[53] rules with the moral, ethical, economic, political and the social rules. A really comprehensive study includes the different aspects of the society. It has been rightly observed by Roscoe Pound that "Jurisprudence, Ethics, Economics, Politics and Sociology are distinct enough at the core, but shade out into each other; when we look at the core or chiefly at the core, the analytical distinctions are sound enough. But we shall not understand even that core and much less the debatable ground beyond, unless we are prepared to make continual deep incursions from each into each of the other. All the social sciences must be co-workers and emphatically all must be co-workers with Jurisprudence".[54] The ancient Hindu jurists were conscious of this and efforts were made accordingly. It is also true that moral, social and other rules far out-number the strict legal rules in the Smriti literature. Many really funny provisions are to be found in the Smriti texts which also profess to be treatises on positive law. Thus Viṣṇu enjoins, "A man should not take curd at night; also a man should not take his meals at night if he has taken heavy

52. Kumārila's Tantravārtika, Chapter I, section 3. Roman Law also originally began as jus nonscripta or unwritten law which meant custom. The Twelve Tables must be the earliest code of the Romans; but it is by no means correct to say that they were the earliest forms or the beginnings of law. So rules in the shape of crude customs must have prevailed prior thereto for the administration and the governance of the society. Similar were the cases with the Codes of Manu and Hammurabi.

53. Roscoe Pound, "Law and Morals", p. 119.

54. Ibid, pp. 123-24.

meals at day time and if he suffers from indigestion". Another Smriti writer Atri provides as to what should be the proper expiation for a Brahmin who eats a fruit climbing up a tree the root of which has been touched by a Caṇḍāla. The penance enjoined is this : The offending Brahmin without changing his clothes should bathe, take ghee and observe the "Naktavrata" for a day. Provisions also are not lacking regarding penances for cases where a Brahmin and Caṇḍāla eat fruits climbing the selfsame branch of the selfsame tree. Again as regards the duties to be observed by cultivators, Atri enjoins that a virtuous cultivator should keep eight bullocks or six bullocks, fot it is cruel to plough with the help of four bullocks; and those cultivators who cultivate with the help of two bullocks only are regarded by him as no better than killers of cows. Regarding this curious blending of legal, moral, social and other rules in the Dharmaśāstras, the observations of the Privy Council are very instructive.[55] From the above discussions it is abundantly clear that the principal thoughts of all the representative Western schools were already reflected in the writings of the sages of the Smriti age at a very early stage of human civilisation. The ancient Hindu jurists quite consciously and competently conceived and applied the synthetic or the unified method of studying jurisprudence which took definite shape in the Western speculation only in the beginning of the present century. As a matter of fact, none of the methods can be sufficient by itself alone. A synthesis of all the methods is a causa sine qua non for the proper approach to the study of jurisprudence. In order to be able to produce perfect juristic concepts and institutions, a synthetic jurist must take into account the past with the Historical school, and must have an eye to the future as well with the Philosophical school for a proper understanding and apprecia-tion of the present with the Analytical school. At the same time the growth of the society as a whole in its various aspects should have to be considered by a jurist to achieve the ideal result. As in the story of the Upaniṣad, the different Western schools of studying jurisprudence like the blind men have hitherto touched and felt the different parts of the elephant's body and their dispute regarding the character of the subject can be satisfactorily solved only by the knowledge of the entirety. The move-ment towards this desired synthesis has only begun in the West in the beginning of the present century, whereas, it attained perfection with the Hindu jurists even at the time of the Smritis.

55. Rao Balwant Singh Vs. Rani Kishori, 25. I. A. 54.

CHAPTER III

The Sources of Hindu Law

1. Introduction

Manu enumerates four and Yājñavalkya fourteen different sources of Dharma. In both these texts, it must be noticed that the word Dharma has been used and it has been used in the sense of 'Varṇāś ramadharma' and not in the sense of Vyavahāra or positive law. The types of literature alluded to by Manu and Yājñavalkya can be regarded as the sources ef Hindu positive law only in an indirect way. It has already been noticed that Dharma, in the comprehensive sense of the term, implying the religious, moral, social and domestic aspects of the life of the ancient Hindus, has been embodied in the different kinds of more or less scriptural literature. But as law proper also is one of the aspects of the social life, it is in this sense that law (positive) also has been discussed therein, however meagre the discussion might have been, in proportion to the other aspects. In reality, the different sources of positive law must be sought in the different aspects of Vyavahāra which have been enumerated as Dharma, Vyavahāra, Caritra and Nripājñā.[1] Hence, the word Dharma has been used in the sense of truths or principles, as embodied in the Dharmaśāstras, used in the most comprehensive sense to include the whole of scriptural literature which constitutes the literary source of Hindu law; the term Vyavahāra has been used in the sense of adjudication, the term Caritra, in the sense of custom and Nripājñā in the sense of royal edicts, i.e., the laws made by the king in his judicial capacity, as the highest tribunal. According to this interpretation, the different aspects of Vyavahāra will represent the different sources of Hindu Law, to wit, the literary, material and the instrumental—as these terms have been used by the modern jurists.[2] Each of the sources of Hindu Law in the above sense of the term will be discussed more fully one by one.

2. Dharma

The term Dharma has been used in the sense of Dharma literature including the Dharmasūtras and the Dharmaśāstras, the Śrutis having practically very little of secular or positive law. In ancient

1. See Hārīta, as quoted in the Smriticandrikā ; Nārada, Introduction, 10.

2. The term source of law has been used in four different senses—literary, instrumental, material and formal. By literary sources are meant the quarters from which law is obtained; by instrumental sources are meant the different organs through which laws are made; by material sources are meant the causes to which laws are due and by formal source is meant the state. See Holland's Jurisprudence, Chapter V.

India, there was no arrangement for Law Reports and hence, no decision could be preserved in the modern sense of the term; all the customs also were nowhere exhaustively enumerated in any literary form, though certain conditions were laid down for the recognition and operation of certain customs; lastly, the king's edicts also were more in the form of judicial decisions than in the form of legislative enactments, their fate being analogous to adjudications in general. Thus the literary source alone occupied the most important position, so much so, that in later literature, by sources of Hindu Law was meant the literary source almost exclusively. Hence, in enumerating the ancient sources of Hindu Law, only the different kinds of literature were enumerated; in more recent times, of course, adjudication and legislative enactments also were referred to as important sources of Hindu Law. Thus the expression literary source, as used in connection with Hindu Law, comprised the Śrutis, the Smritis and the commentaries of which the first played a very insignificant part, as a source of secular law or "lawyer's law" and the last could not be foreseen by the authors of the Smritis, as they were produced much later. The positive law that was to be found in the scriptural literature in general and the Smriti literature in particular was binding[3] on the kings and the judges as well who were to decide cases abiding by their enjoinment, though, of course, the provisions of these so-called codes could be supplemented by the application of reason and the principles of justice, equity and good conscience.[4] It has also been provided by the Arthaśāstra[5] that in case of conflict between Dharma and Dharmanyāya (equity), the decision may rest with the latter, it being superior to the scholastic logic of the Smritis. This ruling of the Arthaśāstra is also admitted in the Dharmaśāstras themselves, the Edicts of Aśoka, the later digests and commentaries and compendia of Hindu Law as well as the writers of the extant treatises like the Śukranītisāra.[6]

3. **Vyavahāra**

Vyavahāra or adjudication must have been a very important source of ancient Hindu Law. The different tribunals including the king with original and appellate jurisdiction used to decide disputes among the litigants. These decisions must have served the purpose of precedents and principles—however rudimentary—for guiding the tribunals in any subsequent dispute on similar or analogous circumstances. An account of the constitution and function of the different judicial units

3. Jayasval—Manu and Yājñavalkya, p. 4!.
4. Narada, Legal Procedure, (Introduction, 40-43).
5. Brihaspati, 11, 12-14; Mahābhārata 1, 430, et seq ; Kauṭilya, Book III, 1.
6. Hindu Administrative Institutions, by V.R R. Dikshitar, p. 257.

in ancient India has been very lucidly given by Prof. B. K. Sarkar.[7] "...It is out of this homogeneous gathering of the primitive tribes with its all round function that judicial tribunals in Sakyan and post-Sakyan India must have been differentiated through ages of evolution in much the same manner as the modern courts of justice in West European countries and in America are historically speaking decended from the folkmoot described by Tacitus in his Germania........."[8] According to the Dharmaśāstras and the Nītiśāstras, there were no fewer[9] than six classes of courts in ancient India. Three of them were the royal courts, beginning with the king and his councillors; below them was the Chief Justice and the last of the royal courts was presided over by the Puisne judges with regional jurisdiction. From the decision of the Puisne judges, appeal lay to the court of the Chief Justice and from that of the Chief Justice to the king in person. Besides these royal courts, there were three other courts representing the folk-element of the ancient Indian judiciary. These were the court of the Pūgas, Śreṇis and Kulas, mentioned according to the order of superiority.[10] Each next higher court was competent to hear appeal from the lower courts. The Kula's decision might be revised by the Śreṇi and the Śreni's by the Pūga ; the Pūga was less liable to partiality than the Śreṇi, and the Śreṇi less than the Kula. Appeal from the Pūgas could lie to the Chief Justice of the state and the highest court of justice was the king himself. From the detailed organisations and the different gradations of the various courts, as conceived and executed by the ancient Hindu jurists, it is quite clear that by uniform and approximate decisions in identical and analogous cases, there were established certain judicial customs and conventions which became crystalised in course of time even though there might not be any system of case law or Law-Reports in the modern sense of the terms. It can be presumed that any organisation worth the name must have some sort of principles and precedents[11]—however rudimentary they might appear to be—for the guidance and justification of the organisations themselves. Frequent uses of expressions like "this is the settled law," "this is the settled rule of law", "the decision is according to the rule establised in judicial proceedings",

7. The Political Institutions and Theories of the Hindus, pp. 107 et seq

8. Jenk's Law and Politics, pp. 139-141.

9. Colebrooke—Hindu Courts of Justice, R.A.S. Britain and Ireland, Vol. II, 1928. P. C. Divanji—Judicial Administration in Ante—Mohomedan Times (Indian Antiquary, July 1915) ; Row's Ancient Hindu Law of Evidence (Indian Antiquary, May, 1920).

10. Yājñavalkya, II, 30 ; Nārada I, 7, Brishaspati I, 30.

11. Report of April 30, 1794 of a Committee of the House of Commons on the Proceedings on the trial of Warren Hartings, Bohn's Edition, VI, 451-452.

will substantially corroborate the above observations. No rule or law can be conceived of unless it is characterised by uniformity. Bacon[12] rightly says, "Judicial decisions are the anchors of the laws, as the laws are the anchors of the state." *It may be mentioned in passing that the force or* weight of precedents has been differently appreciated by the different systems of laws.[13] It was rightly said that the Roman Law was influenced and developed by the Par, as English Law was developed and influenced by the Bench ; of course, there have been of late some tendencies of an approximation of the two theories. The ancient Hindu jurists were fully conscious of the importance of adjudication and were very particular about the correctness of the decisions. Any error in the judgments was to affect the king himself and his administration in general and the participants in the decision in particular. Thus it was the duty not only of the king but also of his councillors and other persons, versed in the science of law, to see that a correct adjudication was made. It has been specially said of the royal courts, presided over by the king in person and assisted by the duly appointed councillors, that the judgment (jayapatra) must follow the deliberation between the king and his councillors. A man, learned in law, was also under a duty to assist the court in coming to the correct decision, free from any error. It is provided by Nārada that councillors were by their very appointment as such, bound to remonstrate with the king in order to impress upon him as to what was the correct exposition of the law, as otherwise, by following the king, pursuing the path of injustice, they would become participators in his act. Though the king was to be helped by appointed councillors and also by other persons, versed in law, still there was a difference in the parts to be played by them. A councillor was by virtue of his post, a member of the king's court and as such, it was his duty to oppose the king, if he wanted to proceed illegally, by remonstrating with him, if and when necessary, as those councillors who follow a king bent on doing an illegal act, have to participate in the sin resulting from the act. On the other hand, the duty of an expert who was not duly appointed as a councillor by the king ended when he gave his opinion and it was no part of his business to remonstrate with the king, even if he did not like an illegal act which

12. De Augmentes—Book VIII, c-3 App. 73.

13. Bole Vs Horton, Vaughan, C.J. (at P. 383); Pollock, A First Book of Jurisprudence (1st Ed. pp. 299). The House of Lords decided in 1898 that it was bound by its own decisions, (London Streets Tramway Co. Vs. London Country Council), (1898) A.C. 375.

the king desired to pursue.[14] The remonstrations by the appointed councillors and the opinion given by the experts in law were undoubtedly very important checks and a wholesome impetus for the growth of the ancient Hindu law on the correct lines.[15] Thus being checked and aided, the ancient judicial machinary of India played a very important part in creating, developing, modifying and improving the law—through adjudication which played and is still playing the most important part in the growth of Hindu Law wit h greater force, particularly since the introduction of the British administration in India. Most practically speaking, at the present time, in deciding a case, the court in reality sees if there is any decided case on the point; if there is a decided case, the judge is bound[16] by the doctrines of stare decisis and communis error facit jus;[17] and if there is no such decided case, then and then alone, he will have to consider as to by what law should the case be governed—Śruti, Smriti, commentry or custom. It may be said that if there is a custom,—ancient, positive, continuous and reasonable, the judge will decide the case according to this custom. Hence, it follows that the actual scope for looking into the Śruti, Smriti, etc. is limited to those cases only where there is no decided case on the point and also where there is no custom affecting the point. In such cases alone, the court may regard the question as open and it will take into consideration as to what is the actual provision on the point, in the Śruti, Smriti, and the commentaries. Looking at the original texts of Hindu Law it is not often possible to say that the deductions (specially by the courts under the British Rule) have always been logical and reasonable.[18] The theory of judge-made law has, of course, been subject to criticism also.[19]

14. There is no sufficient indication that at the time of the Smritis there was any legal profession in the modern sense of the term. Persons versed in the science of law could give their opinion for the consideration of the king and his councillors. The system was perhaps mostly analogous to the Responsa Prudentium of the early Romans. The opinions of the legal experts also were not binding on the king They had no other part to play except giving their opinion.

15. Some Lessons from our Legal History, p. 24. cf. Atlay, the Victorian Chancellors, II, 138.

16. Subject to the general principles stated by Pollock in his First Book of Jurisprudence, Ist. Ed, pp. 299-300.

17. An estimate of the effect of English Law on the development of Hindu Law will be attempted separately towards the close of the thesis.

18. Sir Henry Seaton, Tagore Law Lectures of T. Cowell : Op. cit. p. 20.

19. For the contemptuous description of the English system of the case law, see the observation of Bentham ; (Truth Vs. Ashhurst ; or law as it is contrasted with what it is said to be), Works V. 235.

4. Caritra or Custom

Customs undoubtedly played a very important part as one of the material sources of ancient Hindu Law. It is also playing an equally important part even in the present systems of Jurisprudence. The original Roman Law was nothing but customs; the whole of English Common Law also was derived from customs. Lex Salica[20] also was one of the earliest embodiment of Germanic customs. Though there are large elements of truth in this assertion, still it must be said that the importance of customs in Hindu Law has been over-emphasised by Mayne.[21]

Some of the observations and implications of Mayne, referred to above, are clearly open to criticism. If he believes that the Smritis are so many codes of law, it can not but be supposed that they must have been based on customs, public opinions or social needs. Every codification must be the result of any one or more of the above factors. It must be remembered that society precedes law and not vice-versa. A particular code or act must be introduced for the first time and in that case there must be some justification for its introduction. The Smritis contain comprehensive rules for the governance of the society as a whole and as such they were not confined to purely religious matters. As a matter of fact, the positive law or Vyavahāra that we find enshrined in the Smritis is purely secular law—secularly administered by secular courts—though very remotely it might have been of divine or religious origin. This ultimate basis is nothing but a fiction. Hence, Mayne perhaps has no justification to say that institutions like the Rākṣasa and the Paiśāca marriages could not have been derived from the religious law. His misconception seems to be due to the confusion between the religious and the secular elements of the Smriti literature and the indiscrimination between good and bad customs. It is not only true of the positive law that the customs and usages of the people supplied the nucleus, as it is found in the Smritis, but it is equally true to say that most of the religious rules of the Smritis also were largely based on the religious customs and usages of the people. (See Medhātithi's view, referred to above). The Smritis did not declare for the first time what the rituals and the domestic duties were; they only re-iterated what was being actually followed by the people traditionally from age to age. Again, Mayne himself admits that the actual usages were modified and supplemented by the opinions of the Hindu Jurists to an appreciable extent. Once the final shape was given to the Smriti rules, it is not easy to discern what their earlier character was

20. For a brief but clear account of this lex, see, A Sketch of English Legal History, Maitland and Montague, p. 4.

21. Hindu Law and Usage (10th Ed.) pp. 8-9.

before their embodiment into the so-called codes. Again good or bad customs and moral or immoral usages are relative terms. Many peculiar usages have been included in this Smritis, true. There could not be any reluctance on the part of the Smriti-compilers to recognise certain irreligious customs. It was not the question of reluctance or readiness. The enumeration of certain customs might go to show that they were found actually in existence in the then society without, of course, giving any idea as to the details of their nature and extent of application. Due to different subjective and objective conditions, different rules of human conduct grow in different places among different kinds of people. Hence, there is nothing curious, if in certain parts of the country, certain people observed some rules of conduct which were different from those observed in other parts of the country. The Smritis rightly emphasised the significance of customs, as they could realise that supression of customs would give rise to resentment and rebellion—"Prajā prakṣubbyate anyathā". Mayne has described custom as the "residual and overriding body of positive law". This is again an exaggeration. The Smritis provided for all the general rules, subject in special cases, to certain exceptions which were recognised in cases of special customs, in opposition of the general rules. By ascribing the residuary character to custom, Mayne wants to imply that special customs out-numbered the general rules of the Smritis. But this was by no means the case. It is only here and there that we come across certain special customs. It was, no doubt, provided for by the Smritis that the general Smriti-laws must be understood subject to the exceptions recognised in favour of the special customs ; this is also another general provision by way of exception, as it could not be conceivable to examine and enumerate all the different kinds of special customs from every nook and corner of the country. Mayne has referred to the observations of the different commentators, specially Medhātithi, according to whom the Smritis being only codifications of the usages of the virtuous men and codification being immaterial customs are also included under the term Smriti. This is the result of a fiction based on the Mīmāṃsā theory that customs are based on the lost Śrutis or Smritis. This theory was deemed necessary in order to give some religious colouring or authority for the recognition and observance of customs at variance with the general provision of the Smriti-law which is again based on the Śrutis.

Good customs were, no doubt, recognised in Hindu Law. But there was a difference of opinion among the different Smriti-writers and commentators regarding the relative superiority of law and custom. Thus

Vaśiṣṭha says that Manu[22] has declared that customs of localities, families and castes may be followed in absence of the revealed texts. This view was adopted in its entirety by the Mīmāṃsā school of thinkers according to whom customs were based on the lost text of the Śruti; hence, they maintained that customs opposed to written laws must be discarded. The later Smriti-writers appear to have been in favour of unqualified acceptance of customs even when they are in conflict with the written laws. Thus Brihaspati[23] says that time-honoured insitutions of each country, caste and family should be preserved in tact, otherwise the people would rise in rebellion; the subjects would become disaffected towards their rulers and the army and treasure would be destroyed. He then enumerates certain usages of different localities among different peoples who are not subject to penances or punishments on account of some such irregularities. He also gives some reasons for the observance of the customs referred to by him and hence, it appears that the observance of those customs was merely recommendatory and not mandatory. Nārada also says "Vyavhāro hi balavān dharmastenāvahīyate". According to Asahāya this establishes the superiority of customs to written law.[24] He also quotes a verse to the effect that the immemorial usages of every province which has been handed down from generation to generation can never be over-ruled by the sacred law.[25] The Privy Council has most unambiguously accepted and given expression to the view that "clear proof of usage will outweigh the written text of law."[26] It was further said by the Privy Council[27] that the different schools of law chiefly arose from the difference of local custom; the propounders of the law interpreted the ancient texts in such a way as to make them harmonise with local usages or in other words they had to harmonise the written with the un-written law. As the Calcutta High Court remarked in Jagadamba Vs. Secretary of State,[28] "Their doctrines may often have moulded usage but still more frequently, the doctrines have themselves been moulded according to the prevailing usage of which they are only the

22. VIII, 48, "What may have been practised by the virtuous, by such twice-born men as are devoted to the law, that he shall establish as law, if it be not opposed to the (customs of) countries, families and castes." According to Bülher, Kullukabhaṭṭa, Nārada, Raghunandana, and Nandapaṇḍita agree with this interpretation.

23. VIII, 28-31.

24. Asahāya has taken the word Vyavahāra in the sense of custom; but this is not the correct interpretation. For explanation of the term see Ante Chapter II.

25. Vas'iṣṭha, XVI, 4; Gautama XI, 23.

26. 12 Moore's Indian Appeals, 397 (1868) Collector of Madura Vs Mootoo Ramlinga.

27. Rutcheputty Vs Rajendra, 2 Moore's Indian Appeals 32.

28. 16 Cal. 375.

recorded expression." To the same effect, the Privy Council observed in a recent case,[29] "The commentators do not enact, they explain and are evidence of the congeries of the customs which form the law." From the decisions, referred to above, it is quite clear that the Privy Council laid too much emphasis on custom. This must have been largely due to the influence of the Historical school of jurisprudence which agitated the world of juristic thought in the 19th century. The same influence is again responsible, to some extent, for the views, held by Mayne, as referred to above. According to the Historical school, law is not made; it grows and is to be found in the consciousness of the people. Custom is the true type of law according to this school. The Analytical school also has accepted custom as an important material source of law ; but that only in an indirect way. In criticising the view of Austin, that law is the command of the sovereign, Maine says that many rules of conduct which are enforced like law, do not actually proceed from the sovereign. Thus Maine says that Austin's view does not apply easily to customary law in general and English common law in particular. According to him, the village customs in the Punjab, were laws not because they were commanded by Ranjit Singh, who never thought of the task of laying down laws for his subjects, as his proper function. To this, Austin would reply that the customs are moral rules, so long as they are not acted upon by judges, who have got a delegated authority from the sovereign to issue commands. Holland supports Austin and in reply to Maine's criticism says that so far as the relation of an Oriental tax-gathering state (e.g., the Punjab under Ranjit Singh) to the village customs of subjects is concerned, it may be said that disobedience to the village custom was either acquiesced in or forcibly repressed by the local authority. If it was acquiesced in, the custom was no law at all. If it was repressed, the local force repressing it was in the last resort supported by the strength of the whole state. Thus the humblest custom may be regarded as law, as enforced by the sovereign authority. Again, in his passage, referred to above, Mayne seems to make some distinction between religious law on the one hand and customs or usages on the other. By religious law, he implies the law as enunciated by the different sage-legislators in the scriptural literature. But it should be remembered that all the so-called religious laws also were largely based on and derived from the traditions and customs of the people. Even the earliest Sūtra-writers also referred to certain views and practices prevailing from before their time which were either accepted or criticised. Customs, of course, might be either religious or irreligious. Baudhāyana was the earliest Sūtra-writer who referred, for the first time, to certain customs

29. Balwant Rao Vs Baji Rao, 48 Cal. 30 P. C.

and usages as prevailing in the North and the South. Brihaspati alone, after Baudhāyana, among the Smriti-writers, has enumerated certain apparently irreligious customs, specifying the places where and the people on whom they were binding. But regarding any other customs no such definite specification has been made anywhere else. Lastly, Mayne says that the Rākṣasa, the Asura and the Paiśāca forms of marriage were reluctantly recognised by the Smritis and that six or seven kinds of secondary sons, such as Kānina, Sahoḍha etc. found their way into the Hindu system on account of usage. The questions of these different kinds of marriage and sons will be discussed separately, though as a matter of fact, various similar questions suggest themselves in the discussion of marriage and sonship in Hindu Law in general. Thus before the Smritis, we do not practically come across any form of secondary sons. So also, we do not usually find any mention of the different forms of marriage before the Smritis. What we actually find in the Ṛgveda is a kind of religious form of marriage corresponding to the Roman form of conferreatio. But in the Smritis, we find no fewer than eight forms of marriage[30] and twelve or rather fourteen kinds of sons. The similarity does not end there. After the period of the Smritis, we clearly find that out of the fourteen kinds of sons, only two forms survive. In case of marriage also, out of the eight forms, chiefly two forms, namely, the Brāhma and the Asura only survive. Another very striking point of similarity between marriage and sonship in Hindu Law is that the language that is used by the different sages is analogous and that various conjectures may be made on this point. The forms of marriage and their descriptions have been given in a very strikingly similar manner by Manu, Nārada, Āpastamba and Vaśiṣṭha.

5. Marriage

As regards the different forms of marriage, as enumerated by the writers of the Smritis, several questions suggest themselves. Again, there is a considerable difference of opinion among the scholars on each of these questions. Regarding the nature, form and history of the institution of marriage, the most competent observations have been made by Dr. N. C. Sen Gupta :[31] "The forms of marriage are very largely dependent on environments and as these differ in different societies in their origin as well as their later development, the actual forms of marriage have varied greatly both in their origin and their later growth.

30. Three other different forms of marriage were not enumerated in the Smritis. They were (1) Svayaṃvara form of marriage ; (2) widow-remarriage and (3) the marriage of a courtesan with a house-holder. The last form of marriage was illustrated in the Sanskrit drama Mṛcchakaṭikam.

31. Evolution of Law, P. 56.

It is, therefore, not possible to construct a single course of evolution which will account for all the various forms of marriage."[32] One of Dr. Sen Gupta's observations, also is clearly subject to criticism. It is concerning the daughters. It cannot be said that in the Vedic society a girl was invariably a nuisance. On the contrary, people in ancient India somehow came to believe that daughters, given in marriage with adequate gifts, add to the religious merits of the fathers. In order to acquire this merit, Hindu fathers would become anxious to induce bridegrooms for their daughters. In the Ṛgveda also[33] we find that the daughter of the sun got rich presents from her father, at the time of her marriage. This is further supported by the sages when they are found to discourage any amount of consideration—however small it might be—to be accepted from the bridegroom. Thus Āpastamba[34] also says that if a daughter's father gives his daughter in marriage even after accepting a nominal fee, he lives in the hell named Raurava, for many years and eats dung and urine. Manu also asserts with the same amount of emphasis that if out of greed, a father accepts anything in lieu of giving his daughter in marriage, he commits the sin of killing a cow. The elaborate treatment of strīdhana also including its enumeration and variety, indicates the well-established practice of giving presents to the girls at the time of their marriage.

The Rākṣasa and the Paiśāca forms of marriage could not be sanctioned or encouraged by the regular laws of any civilised society of any time. There might be stray cases where girls were captured either in battle or in lesser disputes and the captivated girls might be taken as wives. But regular forms of marriage in the Rākṣasa form cannot be conceived unless absolute lawlessness prevails in a society. Similarly regarding the Paiśāca form of marriage also, it could not be conceived to be a general rule of the society that some girls must be ravished while they are either asleep or intoxicated. In this case also some such accidents might take place in cases where women were not properly housed or adequately protected. If inspite of necessary protective measures, the girls could not be saved, obviously it could not be regarded as a general rule. There is also no mention of detailed rules for marriages in the Rākṣasa and the Paiśāca forms. Hence, in all probabilities, both these forms of marriage or rather unions existed, if at all, merely as irregularities among the people of the lower castes without sufficient religion and culture. Hence, they do not deserve to be treated as regular

32. Cf. Vinogradoff, Historical Jurisprudence, Vol. I, P, 164.
33. X, 85, 13.
34. IX, 25.

categories of marriage at all in Hindu Law. Nor can the same amount of prominence be given to these two forms along with the remaining forms of Hindu marriage. As a matter of fact, this also must be noticed that all the approved forms of marriage are but the variants of the Brāhma form with slight points of difference. The Asura form of marriage existed in early times and it exists even to-day. But the ban on it, as a disapproved form of marriage seems to have been largely removed and its scope greatly widened. The ancient sages very much depreciated the Asura form of marriage; but at present, even the Brahmins are found to celebrate marriage in this form. Of course, still the idea prevails that the Brāhma is the best form of marriage.[35] The mere mention of different forms of marriage in the text books is not always a guarantee that these forms really existed in the ancient society. This point will be discussed more fully in connection with the different forms of sons, as enumerated in the Smritis.

6. Sonship

Different views have been held regarding the enumeration of the different kinds of secondary sons in the text books on Hindu Law. Some scholars are inclined to think that the conception of the different kinds of secondary sons was adopted by the Aryans from their Non-Aryan[36] neighbours by whom they were surrounded. But this contention can hardly be sustained in view of the consideration of the supposed superior standard of the civilisation and the far more refined taste and culture of the Aryans. Hence, it cannot be conceived, by any stretch of imagination, that the Aryans, forgetful of their own culture and civilisation, stooped down to embrace some immoral institutions and practices, such as, licensed adultery etc. which were fundamentally against their own standard of culture. Another usual form of argument of scholars including Jolly in explaining the abrupt introduction of so many forms of secondary sons in Hindu Law is that the different methods of affiliation were adopted only with a view to increasing the strength of the family by the addition of male members. But this theory can be hardly upheld when it is considered that a man could adopt one and only one son. There is no authority which allows the adoption of more sons than one. It should also be noticed in this connection that no other forms of secondary sons was treated in as

35. The distinction between approved and disapproved forms of marriage is still significant regarding the question of the rules of distribution and inheritance of the strīdhana property.

36. The term Non-Aryan is generally used in a despicable sense to include the people covered by it; but the terms Aryan and Non-Aryan are merely two logically contradictory terms. Moreover, in view of the Mahenjodero relics, it must be said that the original peoples of India even before the advent of the Aryans developed a high standard of culture.

great details as the "dattaka" form. Hence, all the secondary forms of sons cannot be placed on the same footing, as it has been already seen in the case of the different forms of marriages. Another argument put forward by some other scholars is that women of the early society would not attach so much importance to the chastity and purity of their character. But from the famous Yama-Yamī hymn of the Ṛgveda[37], it is quite clear that incest was, by no means, tolerated or encouraged by the Vedic people, particularly among near boold-relations. It was also regarded as very disgraceful, if a man's wife would be approached by any other man, as we find in the gambler's hymn of the Ṛgveda.[38] The gambler in this hymn is found repenting saying that by his abject addiction to the game of gambling, he had lost all his properties and his wife also had been approached by other men. Of course, there are some relics in the Ṛgveda where women have been described as faithless and heartless in the affairs of love. Thus in the Pururavas-Ūrvaśī hymn, Ūrvaśī is saying to Pururavas that there cannot be any lasting friendship of men with women. Obviously, these are the words meant for the consolation of a disappointed lover. But it may be that the sages, chief among whom are Manu and Yājñavalkya, enumerating the different kinds of the secondary sons, with a brief description of each of them, were perhaps giving an exhaustive list of all the possible forms of secondary sons that might be conceivable, without any serious reference to the fact that they might be really existing in the then society. Verily, the sages were stereotyping the exhaustive list of the possible forms of the secondary sons. If we closely examine the different types of secondary sons, enumerated by the sages, we can hardly suggest a fresh type of secondary son which has not already been recognised by them. Thus sons, conceived and given birth to before and after marriage, have been mentioned; sons, begotten by the father and also by persons other than the father, have been noticed; sons, given away by their parents, sons who give away themselves of their own accord and the sons who are discarded by their natural parents and are picked up by strangers are there; there are also sons that are begotten by manners, both licensed and unlicensed and, last but not the least, there are sons born of Śūdra women and Dvija women, by men of regererate classes and the Śudras. In view of the exhaustive nature of the enumeration of the different kinds of secondary sons by the different writers of the Smritis, we can assume almost with impunity that the sages were only giving an ideally exhaustive representation without any reference to the actually existing state of things. And there is no gainsaying

37. Ṛgveda X, 10.
38. X, 34.

the fact that the Hindu jurists of the time of the Smritis were more philosophical than analytical in their view. They did not simply enumerate things how they really were, but they often propounded things how they ought to be. Hence, it is that Hindu Law seems to be more normative than positive. Besides the mere mention of certain institutions or concepts is not any guarantee that they really prevailed in the society. The implication of this assertion will be sufficiently clear, if we refer even to the most recent text books on Hindu Law. We know, as a matter of fact, that all the secondary sons, except two, have become obsolete long since; but still these forms of sons are so fondly enumerated by the text-writers that the readers will not be given even the least indication that they are no longer in vogue. Thus it is not unlikely that the secondary forms of sons or at least many of them were obsolete even if they existed at all, at a time of immemorial antiquity. Nevertheless, they did not cease to be enumerated by the subsequent Smriti-writers exactly for the same reasons as the present text-writers of law do not fail to refer to the obsolete forms of secondory sons in Hindu Law.

In connection with the criticism of the remarks of Mayne, let us now refer to the different forms of sons. A Kṣetraja son is one who is begotten by a man other than the real husband of the woman. A great difference of opinion regarding the ownership of a Kṣetraja son was referred to by Manu[39] and Vaśiṣṭha.[39a] According to one view, the son belongs to the begetter who is supposed to represent the seed and according to the other view, the son belongs to the husband of the woman who is like the field on which crops are raised.[40] As evidenced from the controversy, referred to above, the evolution of the conception of Niyoga seems to have taken place from the consideration of the question of the possession of the son, begotten by appointment, contrary to the usual belief that it was discontinued with the growth of the moral ideas of the people by whom the chastity of women began to be prized. Save and except the tradition of the king Bena,[41] in all the controversies, referred to above, by Manu and Vaśiṣṭha, regarding the ownership of the son begotten, the institution itself was not despised for any moral consideration, except for the fear of being deprived of the possession of the son concerned. Indeed, one hermit says with considerable naïvete that he has received the opinion that the son begotten on another man's wife could be of no use to the owner or the husband of

39. IX, 32-34; 48-55; 181. 39a. XVI, 6, 7.

40. There are several other analogies on this point.

41. The tradition of the king Bena lends support to the view of Manu, that the system of Niyoga cannot be supposed to have existed at least among the twice-born classes.

the woman in the other world or in the realm of Yama. In this world, of course, there was no room for doubt that the son begotten by a stranger belonged to the husband of the woman. Thus it follows that the system of appointment seems to have been discouraged from both sides, represented by the man appointed and the husband of the woman. The benefit of a son, born as the result of Niyoga, was to go to the owner of the woman and not to the begetter at least in the present world. Hence, the begetter had obvious reasons to be discouraged in raising issue of whose possession he was sure to be deprived. The husband of the woman again had, no doubt, the advantage of possessing the son, begotten by appointment in this world, but he had at the same time an apprehension of being deprived of the utility of having a son in the next world of Yama. Hence, the husband of the woman also had sufficient reasons not to allow his own wife to be approached by a stranger, as the utility of a son consisted in the service to be rendered more in the world of Yama than in this world. Being thus discouraged from both the parties, the institution of appointment came to meet its natual death, if it had any existence at any period of the society at all. The Bṛihannāradīya Purāṇa prohibits "devareṇa sutotpatti," *i.e.*, the raising of sons by appointing a devara for the wife of his elder brother. The Āditya Purāṇa also recognises only primary sons and dattaka sons. The Purāṇas mostly came after the Smritis and cannot supersede the Dharmaśāstras.[42] Hence, if there was no provision for the prohibition of the secondary sons in the Smritis, but if it was found only in the Purāṇas, how is it consistent to accept the contentions of the Purāṇas to the supersession of those of the Smritis? Thus both the appearance and disappearance of the most of the secondary sons, for all practical purposes, seemed to have been shrouded in mystery. The different forms of secondary sons were thus inserted in the Smritis, as it has already been suggested, only for the purpose of presenting an exhaustive list of all the conceivable forms of secondary sons.

A Gūḍhaja son is one who is born in secret. The very secret character of the procreation indicates that it cannot be a regular and bonafide system. Such a son might be the result of the loose sense of chastity on the part of individual women concerned; they could bestow their favours on those who could approach them unnoticed by others. In these circumstances, it is not necessary, as it has been suggested by Kullukabhaṭṭa, that the husbands must be away from their houses. Only a temporary absence or indifference of the husband might be sufficient for the vicious

42. Wilson also rightly remarks that the Purāṇas are not authorities in Hindu Law and that they may be received only in explanation of the interpretation but not in proof.

indulgence on the part of the wives. The vicious character of a woman is not the special feature of any particular society or a particular stage of it. Such things occurred in the past and they still occur in the present as well. And once the son is born, nobody could attribute the fatherhood to any other man except the husbands and the wives also could not disclose anything regarding the fatherhood. Naturally, the presumption would be that the husbands of the women were the fathers of the sons concerned. Hence, it is not proper to say that the Gūḍhaja form of son existed in the society and that in course of time, it became obsolete. Though there is obvious immorality connected with the birth of a Gūḍhaja son, yet, he can hardly be regarded as a secondary son, unless we view the case most strictly from the standpoint of conjugal fidelity. Virtually, the fatherhood is attributed, though wrongly, to the husband of the woman.

A Kānina son is one born of an unmarried girl. Considering the recognised distinction between approved and disapproved forms of Hindu marriage, the sanctity of the marriage-tie and the paucity of the instances of the Kānina sons, it can be asserted that such a regular institution could not possibly exist at any stage of the Hindu society. These things may be found now-a-days also—not as rules but as exceptions—where unfortunately, girls happen to become mothers even before their marriage on account of over-indulgence and carelessness. The above observations apply mutatis mutandis to a Sahoḍha son also. A Sahoḍha son differs from a Kānina son only in one important respect. The Kānina son is accomplished fact. In this form, the son is already born even before marriage. But in the other case, he is not born but is only borne in the womb of the bride. In this form, there is ample scope for the presumption that as the son is born after the marriage, he must be the son of the husband of the girl. Apply this presumption and there will be no secondary sonship in this case. Like a Kānina son, a Sahoḍha son also was naturally held in a very low esteem by all the sages. Besides instances of Sahoḍha sons can hardly be found in the Dharmaśāstras. Hence, the Sahoḍha forms of sons could not represent any regular rule of the Hindu society. If they represented anything at all, they represented some rare exceptions to the general social rules.

A Paunarbhava son is one who is born of a Punarbhū or a twice-married woman. Taking for granted that even once-married women could and did take second husbands after having forsaken their former husbands, the question of secondary sonship does not arise at all. So far as the second husband is concerned, there is no earthly reason why he should be deprived of the possession of the sons, begotten by himself. If the second marriage

of the woman is regarded as valid, the sons born of that marriage are to become the primary and legitimate sons of the second husband of the woman. There was no fiction in this case, by which the son begotten by the second husband of the woman could belong to the first husband. Hence, in this case also, there is hardly any necessity of admitting the existence of subsidiary sonship. And except for the mere mention of this form of son by the sages, there is practically no other evidence that such a form of son did really exist in the ancient Hindu society. An Apabidha son, again, is one who is cast off by his natural parents and taken up as a son by a stranger. Such a form of son can never represent a regular social rule. There might be very rare cases where the parents who were no better than monsters in human shape, could cast off their own sons.[43] None can say that viciousness on the part of man or woman has disappeared and that illegitimate births have ceased to take place. The practice prevailed more or less in the past and similarly it prevails in the present also ; but discarding of legitimate sons must have been very rare. It might be that sons would be regarded as discarded by parents on account of their death, disease or attack by robbers or wild animals. In these circumstances, the sons might be fortunate enough to happen to come to the notice of some kind-hearted men who would take them home and bring them up like their own sons. These infants also having no knowledge or trace of their own natural parents, would be taught to regard the foster parents as their real and natural parents. It is in this way that the relation of father and son would be established between cast off children and strangers. Hence, an Apabidha form of son cannot be said to have represented at any stage of the society a regular institution for affiliating subsidiary sons.

A Niṣāda son is one who is born of a Śūdra woman in connection with men of the regenerate classes. A son by a concubine is also classed by some sages with the Niṣāda son ; obviously, the sons born of the unions of Śūdra women and twice-born men were held in a very low esteem. A son, born of a concubine in connection with a Śūdra, was entitled to maintenance as well as inheritance, but in that case the concubine must have been under the absolute control and exclusive keeping of the man who is supposed to be responsible for the son's being.[44] But a Niṣāda son, begotten by a twice-

43. In the Ṛgveda, (II, 29, 1) also we find that illegitimate births were concealed and that vicious and wicked women discarded the children that were born in secret. It is doubtful if legitimate sons, born of lawful wedlock, could be easily discarded by their natural parents except under very exceptional circumstances. The conception of Apabidha son might have been taken from the texts of the Ṛgveda, referred to above.

44. Datti Parisi Vs Datti Bangaru, 4 Mad. H.C. 904.

born was entitled only to maintenance without any right of inheritance. It is also doubtful if such a son could at all offer the benefits of funeral oblations like a natural son or a dattaka son. Though there is no special provision in the Dharmśāstras, in this respect, it can be understood that if a natural born son existed, the Niṣāda son or the son by a concubine could not certainly offer oblations to the so-called father, in preference to the real and legitimate son. As a matter of fact, it is dubious as to what extent a Niṣāda son could be regarded as a son at all in the etymological sense of the term putra. The mere fact of his claim for maintenance cannot warrant the conclusion that he served the real purpose of a son. Even at the present time, a man responsible for the birth of an illegitimate child is bound to maintain it on pain of quasi-criminal and quasi-civil liability.

7. Kings Edict

King's edict does not mean any legislative act passed by the king; it means the law as given rise to by his judicial decisions, as the highest tribunal with both original and appellate jurisdictions. When any case was tried by the king in person with the help of councillors, there was no appeal therefrom and when any case was tried by the other lower courts, the king's court was the highest appellate court above them all. According to Brihaspati, assemblies of kinsmen, artisans, co-habitants and the Chief Justice are declared to be the tribunals to whom he whose cause is tried previously may appeal in succession; when a case has not been rightly decided by the assembly of the kinsmen, it should be heard by the body of artisans, and when it has not been duly investigated by the body of artisans, it should be examined by the meetings of co-habitants and when it has not been sufficiently enquired into and decided by such assemblies or meetings, it should be tried by the judges appointed by the king. In authority, the judges were superior to the assembly of kindred and and rest; the Chief Justice was above the puisne judges, and the king was superior to all, as he was always supposed to be passing just sentences.

The king, as it has already been noticed, always executed and never formulated laws except through adjudication. This will be fully corrob-rated by verses 19, 23, 33 and 52 of the 18th title of Nārada. According to the first of these verses, whatever sentence a king may pass, whether just or unjust, settles the law; according to the second verse, royal orders are declared to arise from law-suits; the third verse enumerates the different functions of the king, but it does not contain any legislative function direct; the fourth verse also refers to the purely judicial function of the king; again according to Brihaspati also,[45] the edict of the king

45. II. 18-27.

clearly refers to the judicial decisions made by the king ; royal edicts never imply any legislative enactment passed by the king. This will be quite clear from the illustrations given by Brihaspati regarding the king's edicts which are to be found in the decision of the king, (1) when no evidence is forthcoming ;[46] (2) when the judges and the law books are at variance with one another ; (3) and lastly, when the king disregarding established usages passes a sentence according to his own discretion and consideration. It has been rightly said that "the administration and the administrative machinery were not entrusted with the legislative or the law-making functions......Therefore, the king and his agents who carried on the government were as much subject to the law as the subjects themselves. The king could not change the law in his own favour except to the extent that an administrator of law could introduce changes in administering law. This absence of legislative power in the administration takes away the important influence that had the tendency to make the ruler degenerate into an autocrat."[47]

According to K. V. Rangaswami Aiyangar also "Medhatithi roundly declared that a king cannot make a law, over-riding Dharma" and also that "the evidence of history does not disclose any exercise of the alleged regal power of independent legislation."[48] Again he says of the king, "He cannot make a new law. The royal edict is merely declaratory and not innovative."[49] Reference has been made to these views by J.D.M, Derrett, Tagore law Professor of the Calcutta University,[50] in connection with the discussion of the views of a particular orthodox section of the Indian people who were opposed to legislation in derogation of the received tenor of the Dharmaśāstras. The reaction was expressed typically thus : "Let them pass what they choose ; for our part we shall do our best to avoid the courts. As for the so-called Hindu Code Bill, they may codify what they please but let them have the courtesy not to call it Hindu Law for that is just what it is not."[51]

46. Manu, VIII, 265 ; Vas'iṣṭha, XVI, 13-15 ; when the boundaries cannot be ascertained by marks or evidence, the king as an arbitrator should demarcate them with the best of intentions.

47. Introduction by Dr. S. K Aiyanger to "Hindu Administrative Institutions" by V.R.R. Diksitar, pp. 32-33.

48. Rājadharma, p. 23.

49. Ibid, p. 133.

50. For 1953.

51. From a contribution to the proceedings in preparation for the Fourth Conference (1954) of the International Academy of Comparative Law in Section I.D. 2 (Law, Religion and Morals). A.I.R. (1953), Journal section, p. 52.

Undoubtedly, one of the arguments of the orthodox Hindus is that modern legislature is not competent at all to make law, against the time-honoured principles of the Dharmaśāstras. But this view can no longer be supported in view of the modern democratic and progressive ideas that are very rapidly advancing. As a matter of fact, the entire law of the Dharmaśāstras was based essentially on the Varṇa and Āśrama Dharma. But both Varṇa and Āśrama have already given way before the changed conceptions of social and religious sense of justice and equity—the latter (namely, the Āśrama) being hardly visible in the modern Hindu society. Hence, it is no wonder that the authority of the legislature will have to be accepted. The acts of the modern legislature can not be regarded as analogous to the edicts of the king that might have been passed in the ancient society.[52]

Professor Derrett is unable to agree with the views of Dikshitar and Aiyangar, referred to above. He is emphatically of the opinion that "despite the opinion of Medhatithi, as expressed in his commentary on Manu, VII, 13, rulers 'did' legislate from time to time...........often in such a manner as clearly to contradict the views not only of the Smritis but also of eminent contemporary jurists." Continuing Professor Derrett says that "the occasions where the ruler issued edicts in consonance with their views are not lacking; but the very fact that they were necessary tells its own tale. A list of digest of the surviving specimens of legislation would be lengthy, but a few illustrations may be given. Legislation, applicable generally or to one or more castes in particular, elevated illegitimate sons to the rank of heirs; allowed concubines to inherit as if they were widows; disallowed the widows right of inheritance; enabled divided brothers to inherit; introduced fathers-in-law and sons-in-law into the list of heirs; gave concubines rights of burial, legally only available to wives; raised or lowered the penalties, appropriate to various offences; introduced distinctions between certain types of crimes and finally made innumerable distinctions, changes in and additions to the roll of rates, tolls and taxes, in fact the whole complex machinery of the revenue.........all without regard for the often precise terms of the Dharmaśāstra".

It is difficult to accept all the above assertions without some reservation. In the first place, in the Dharmasūtras and the Dharmaśāstras themselves no legislative competence was recognised in behalf of the kings. This point has already been discussed in a fairly detailed manner with special reference to the provisions made by the two most eminent authors

52. Ibid.

to wit, Nārada and Brihaspati who belonged to the latest epoch of the Dharmaśāstra literature. Hence, if any legislative authority was recognised in behalf of the kings, it was clearly by the commentators[53] and not the original Smriti-writers. In the second place, the references[54] given by Prof. Derrett himself showing the sources of the examples of royal enactment almost exclusively indicate a period subsequent to the composition of the Dharmasūtras and the Dharmaśāstras. The revenue machinery was quite different from the judiciary and was governed by special consideration of the royal treasury and public finances.

The Acts passed by the subsequent legislature and the commentaries and Nibandhas, though not foreseen by the sages, played very important parts in the development of Hindu Law. Their influence is still continuing even at the present time. They will be discussed separately.

53. Cf. Vis'varūpa, S'rikara, Bhojadeva, Hārīta, as discussed Supra.

54. Journal of the Royal Asiatic Society of Bengal (letters) Vol. XVI, I (A. D. 592) ; Epigraphica India, XIV, pp. 190-1 (A. D. 725) ; Ep. Ind. XXV, p. 237 (A. D. 650) ; South Indian Inscriptions, IX, Pt. I, No. 77, (A. D. 992) ; Ep. Ind. XX, pp. 68 and ff. (A. D. 1012), Ep. Ind. XV, pp. 79 and ff. (A. D. 1053) ; Ep. Ind. V. P. 28 (A. D. 1178) ; Ep. Carnatica III, Tiru Makulal-Narsipur 21, (A. D. 1222) ; Ep. Car. IV, Nagamangala, 49 (A. D. 1270) ; Mysore Archaelogical Report for 1920, Sec. 81, (A. D. 1336) ; Ep. Car. VI, Chikmagalur, 105 (A. D. 1343); Vide 1953 A. I. R. (Journal), p. 61.

BOOK II

(Hindu Period—1000 B. C. to 1100 A. D.)

CHAPTER IV

The Dharmasūtras

1. Dharmasūtras : their nature and characteristics

The Dharmasūtras are the earliest types of literature in Sanskrit in which some details of the law in the modern sense of the term are available. It is curious that many principles on Hindu Law, as conceived by these earliest Sūtra-writers are surviving and being applied even in the modern administration of Hiudu Law. There is no warrant for the generalisation that the Dharmaśāstras were based on and versified from these Dharmasūtras. The versification of the Dharmaśāstras and the treatment of the Vyavahāra had also nothing to do with the different schools or Caraṇas of the Vedas. There might be some truth in Jayaswal's thesis that they had nothing to do with or were not at all based upon the Sūtra works. But at the same time, it is difficult to accept the view of Jayaswal that the Vyavahāra law must have been based on and preceded by many secular law-treatises like Kauṭilya's Arthaśāstra. Law was never treated separately by the early writers : it was treated either as a branch of scriptural literature or politics. No other work on Arthaśāstra except that of Kauṭilya has also come down to the present period. Nor can anything be known definitely about the age and other particulars of the earliest Sūtra-expounders. There is hardly any data from which the identity of the authors and the places where they flourished can be ascertained with any degree of precision and credibility. From certain points of resemblances and similarities of ideas and expressions, many scholars are inclined to draw inferences regarding their relative priority in time and the degree of influence exerted by one upon the other. But it should be clearly borne in mind as a caution that mere similarity of ideas and expressions are no sure indication of borrowing or imitation. Though this is more or less generally true of all literature, it is particularly true of ancient Sanskrit literature. Again, in ancient India, easy means of influence and borrowing could hardly be conceived in view of the lack of communication and circulation or propagation of the thoughts and writings of persons flourishing at distant places and at distant times. Regarding the age of the Dharmasūtras, a good deal of speculation has been made; but it is impossible to dogmatically assert one thing or another in absence of

infallible evidence. In most of the cases, the arguments that are used are more subjective than objective and in many cases quite different views also can be held with equal emphasis and impunity. Thus it is generally believed that the important Sūtra literature was composed between 600 B. C. and 200 B.C. The earlier limit can be easily extended upto 1000 B.C., if not more. But as there is no reference to the Arthaśāstra of Kauṭilya in the Dharmasūtras and as the work of Kauṭilya was much more systematic with exclusive devotions of chapters to civil and criminal law, it may be presumed that the Dharmasūtras were written before the Arthaśāstra of Kauṭilya which was undoubtedly written about 300 B. C. There is also no sufficient reason for separating the Dharmasūtras on the one hand and the Babylonian and Egyptian codes on the other by very long periods of intervals. Hence, though no clear-cut limit can be fixed to the composition of the Dharmasūtras, it will not be very far from the truth if it is said that these works were mainly produced between 1000 B. C. and 300 B. C. The difficulty for advocating any definite period for any particular Sūtra-writer is still greater. Hence, they may be only grouped conveniently as being of about some approximate time without any particularisation of period or place. This again will have to be conceded on the discussion of the internal matters, as dwelt upon by the writers themselves. Herein again the caution must be remembered that mere omission and repetition of a topic does not surely indicate the priority or posteriority of any author. If an author does not mention any principle, it does not follow that he was earlier in time. Principles and rules were necessitated by the needs of the time and place concerned. Hence, uniformity of discussion and identity of concepts cannot be expected every where. Still there might be some truth in a general statement that provisions of details regarding any rules or procedure and reference to earlier authorities might indicate posteriority of time.

It should be clearly prefaced at the very outset that the Dharmasūtras are not the exclusive codes on civil or positive law. These are treatises, written for giving the rules of guidance for the different stages of life and the rights and duties of persons of the different castes in the early Hindu society. In course of these discussions, something has been spoken of law in the modern juristic sense of the term, as much as they were necessary for the regulation of the society as a whole, with the king at the head of the administration and the Brahmins at the head of the religious and social regulations. The unit of the ancient age was to be found more in the society than in the state. As a matter of fact, the social regulations far outnumber the legal rules and procedures, as we clearly find in the ancient Sūtra-literature. The purely legal matters are very few and far

between in the scheme of discussion of the social rules, as conceived by the ancient writers of the Sūtras. Hence, it is not unusual that the topics of law have been scattered here and there throughout the whole Sūtra literature without any principle or cohesion. There was no treatise in the earliest epoch of the Hindu literature dealing exclusively with purely legal matters. But the little legal materials that are to be found in the earliest Dharmasūtras can, by no means, be ignored or neglected. Many of them are applied even in our present society without any very appreciable change or modification. The conservativeness is perhaps one of the most conspicuous characteristics of the Hindu law in particular. Even today, the instructions regarding Aśauca, impurity, the different ceremonies meant for marriage, investiture of the sacred thread etc. are most scrupulously followed. The different saṃskāras that have been dealt with in the Gṛihyasūtras are still to be found in the modern Hindu society without the least indication that the society for which they were prescribed had undergone an almost revolutionary change in the present time. Inspite of all that has been said above, there is no denying the fact that the tendency towards secularisation, humanisation and rationalisation could be visibly perceptible in the growth of the Hindu society and law. Hence, though originally, the kingship was in a sense subordinate to Brahminhood, still the king began to assert himself, little by little, when ultimately the priesthood came to be confined merely to domestic and religious ceremonies. Thus the administration of the kingdom and the governance of the mutual relation of one subject with another came to be entrusted to the king. In the Sūtra literature, specially, the legal topics have been discussed only as supplements or corrolaries to the rules mentioned for the different castes and Āśramas, the chief among which was that of the house-holder. As a house-holder, a man has to come in contact with others and enter into innumerable transactions which call for the enunciation and administration of certain legal principles and procedures—however crude and rudimentary they might have been.

2. Gautama

Gautama has been rightly regarded as the earliest of the Sūtra-writers—almost by all authorities including Kane, Jolly, and Bühler. He has been copiously quoted by other Dharmasūtra-writers, but he himself has referred only to Manu by name and that also only once. Of course, Gautama has referred to others, but never specifically by name. According to Parāśara, Gautama has been placed only after Manu. But the existence of the Mānava Dharma-sūtra has been rightly questioned. And if this Manu refers to the author of the famous Smriti, Gautama must have flourished much earlier and he must be regarded as the

earliest of the Sūtra-writers. In dealing with the Dharmasūtras and the other allied types of literature, I shall single out the purely legal topics without indulging in any discussion of the religious or the ritualistic matters on various topics and shall broadly classify the topics as (1) civil law, (2) criminal law and (3) procedural law, punishment and the functions of the king. First of all, Gautama enumerates the Vedas, the traditions and the practices of those who know the Vedas, as the principal sources of sacred law or Dharma.[1] Elsewhere, he enjoins that the administration of justice by the king should be regulated by the Vedas, the institutes of the sacred law, the Angas and the Purāṇas. The laws of countries, castes and families which are not opposed to the sacred laws have also authority. Again cultivators, traders, herdsmen, mony-lenders and artisans have authority to lay down rules for their respective spheres. This is not all. Gautama goes further and lays down that the cases for which no rule has been provided for, should be governed by the course, approved by at least ten Brahmins who are well-versed in the scripture, skilled in reasoning and wholly free from cupidity. In this connection, he refers to the pariṣad[2] and its constitution. On failure of the members of the pariṣad, the decision of even a Śrotiya,[3] well-versed in the Vedas and properly instructed in the different rights and duties, could be followed in doubtful cases.

3. Civil Law—marriage and sonship

Gautama enumerates the different forms[4] of marriage and the prohibited degrees. A legal marriage cannot take place between persons who have the same Pravara, and who are related within the sixth degree on the father's side and the fourth degree from the mother's side. He also refers to the confusion of castes resulting from Anuloma and Pratiloma[5]

1. By the word Dharma, Varṇa and As'rama dharma is meant. Civil law has got to be singled out from the books on Dharma, as a fraction thereof.

2. The way in which Gautama refers to pariṣad clearly indicates that it must have existed from before his time. It was declared to have consisted of four men who had completely studied the four Vedas, three men belonging to the first three As'ramas and three men who knew the different institutes of law.

3. A Brahmin becomes a S'rotriya by the combinations of his birth, saṃskāra and learning.

4. Gautama refers to the 8 forms of marriage and further says that only the first four namely, the Brāhma, Ārṣa, Daiva and Prājāpatya are lawful. He, at the same time, admits that according to some others, the first six forms including the Asura and Gāndarva also are lawful. Hence, according to the latter view, only the Rakṣasa and the Pais'aca forms are unlawful.

5. In an Anuloma marriage, the wife belongs to the lower class and the husband to the higher caste. The reverse takes place in Pratiloma marriage

marriage. No fewer than 28 mixed castes have been enumerated including Māhiṣyas, Yavanas and Caṇḍālas. Sons, born of different kinds of marriage, differ in degree of excellence. Sons, born of wives of equal castes, wedded according to the approved rites, sanctify the entire family. Sons, born of the Ārṣa[7] form, can save only three ancestors from hell; sons, born of the Daiva and the Prājāpatya forms of marriage, can save only ten ancestors, whereas the sons, born of the Brāhma form, can save from hell ten ascendents, ten descendents and himself. Gautama also insists on early marriage; girls should be given in marriage even before they learn to put on clothes and thus move about naked, (XVIII, 23). He enumerates 12 kinds of sons including the Kṣetraja son regarding whom he has given certain details, unknown to others. He has also mentioned the views of some others on his point. A widow, according to him, may bear a son to her brother-in-law (devara)[8] obtaining the permission of her gurus. In absence of Devara, a Kṣetraja son may be begotten by a Sapiṇḍa, Sagotra, Samānapravara or one who belongs to the selfsame caste.[9] Not more than two Kṣetraja sons should be begotten, as one son could not be regarded as sufficient for the continuation of the family on account of the element of uncertainty implied by the possession of a single son. In absence of agreement to the contrary, a son belongs to the begetter, but when a son is begotten at the request of the living husband, he belongs to the husband. If begotten by a stranger, the son belongs to him or to both the begetter and the husband. Again it is said, as the son is brought up by the husband of the mother, so he belongs to him.

4. Guardianship

The infants and the students were entitled to special protection of the king, until the attainment of majority by the former and completion of study by the latter.[10] The principle of adverse possession does not apply to the minor.

5. Vicarious liability

As a general rule, if any damage was done by cattle, the owner of the cattle was responsible for it. But if the cattle were attended by herdsmen,

6. Gautama, IV, 16-21.

7 Thr Arṣa form of marriage was depreciated perhaps on account of the fact that the bride's father receives in this form of marriage, one pair of cows from the bridegroom. Any gift received from the bridegroom's side was regarded as a sin in the ancient Hindu society.

8. Yāska derives the word 'devara' thus : devara kasmāt—"dvitīyo vara ucyate."

9. Gautama also refers to the views of others according to whom the devara alone is entitled to beget a son on his elder brother's wife.

10. This is exactly the attitude of all modern systems of law also, so far as the property of the infants is concerned. The conception of studentship in ancient India was, of course, peculiar, on account of the first stage of life, *viz*. Brahmacaryya.

they[11] were liable for the damage.[12] In case any damage was done in an un-enclosed field near the road, the responsibility would fall upon the herdsmen as well as the owner of the field. The joint responsibility of both perhaps implies the degree of negligence and carelessness on which the damage was to be apportioned. Thus if the field was without any protecting fencing, it might imply some carelessness on the part of the owner of the field ; but in this case also, the herdsmen could not be absolutely absolved from their duty of taking reasonable care for preventing their cattle from doing wanton damage to the crops of the field. But if inspite of their reasonable care, any damage would be caused, it would fall on the owner of the field on account of his contributory negligence and the general maxim that the loss must lie where it falls. It is only in case of gross negligence that the herdsmen could be made liable.

6. Interest

According to Gautama, the legal interest for money lent was at the rate of five Māṣās a month for 20 Kārṣāpaṇas. As according to Haradatta, one Kārṣāpaṇa is equivalent to 20 Māṣās, so the rate of interest at the above calculation amounts to 15 *per cent per annum.*[13] According to some, as referred to by Gautama, the above rate of interest should not be paid for more than a year.[14] The principle of Damdupat[15] was also enunciated by Gautama. According to this principle, the interest could never exceed the principal. No interest could be charged, when the loan was secured by a pledge, which the creditor was entitled to use

11. According to modern principles of tort, a master or a principal is generally responsible for the tort committed by his servants or his agents. But the case is otherwise with the independent contractors who are responsible for their own wrongs. In case of herdsmen also, these general principles of liability applied, as in usual practice, the herdsmen were in most of the cases occupying the position of independent contractors ; some cattle would be given to the herdsmen for rearing them on the contractual basis of dividing the offspring. Hence, they were also accountable for any loss of cattle by carelessness or negligence. Cf. The Code of Hammurabi, ss, 264-65 , Hebrew Legislation, Ex. 22, 1 and 4.

12. Five Māṣās were to be paid as compensation for damage done by a cow ; six Māṣās for a camel or a donkey ; ten Māṣās for a horse or a buffalo and two Māṣās for each goat or sheep. But in case the whole crop was destroyed, the value of the entire crop must be paid along with an additional fine. (Gautama, XIII, 22-26).

13. This rate of interest is perhaps wrongly attributed to Vas'iṣṭha by Manu. Gautama appears to be the original propounder of this rate of interest. Vas'iṣṭha quotes perhaps from Gautama or both might find it already prevalent.

14. From the context, it might imply that 15% was the maximum rate of interest and that this rate could not be demanded, if the loan remained unpaid for more than a year. Usury was never encouraged in the ancient society. A usurer had been described as more sinful than the killer of a Brahmin. (Cf. Baudhāyana, Chapter III, Vas'iṣṭha, Chapter III, 29).

15. It has been recognised and retained in the present administration also for the Hindus in Bombay and the presidency town of Calcutta

according to the stipulation. No interest also could legally be demanded, if the money with the interest was tendered or when the debtor was forcibly prevented from re-paying the loan. Various kinds of special interest were enunciated by Gautama, such as, compound interest, daily interest and the interest on the basis of the use of the property, pledged, according to the terms and conditions, stipulated at the time of the transaction.[16] He also refers to some kinds of loans other than of money and fixes the maximum of the interest.

7. Debt

At the first instance, Gautama,[17] enjoins that the heirs should pay the debts contracted by their deceased forefathers. But at the same breath, he enumerates certain important exceptions, (XII. 41). Thus the debt or money due on account of a surety,[18] a commercial debt,[19] a śulka[20] and the debts, contracted for spirituous liquor or in gambling and fines shall not be paid by the heirs of the debtor.

8. Trust

According to Gautama, a deposit, open or sealed, an object lent for use, an object having its price still un-paid and a pledge need not be compensated for by an innocent person, when they are lost or destroyed without any fault or negligence on his part. All the transactions are more or less cases of trust and the trustees were to take reasonable care regarding the trust property, as if the property was their own.[21]

9. Inheritance, primogeniture, partition and re-union

Gautama's general rule is that the sons should divide their father's wealth only after the latter's death. But the division can take place even in the lifetime of the father, when the mother is past the age of child-bearing or when the father permits it. Again Gautama says that the whole property also may be taken by the eldest son on condition that he shall maintain the

16. Even at the present time loans with security bear a smaller rate of interest. The reasons are quite obvious. The security implies the guarantee against the failure of the loan.

17. Gautama, XIII, 57.

18. Haradatta, the eminent commentator, understands this in the sense of a bail for the personal appearance of an offender. He comes to this conclusion after a comparative study of the relevant texts of Manu and Yājñavalkya on this point. Clearly the heirs were exempted from such debts, as they were not benefited in any way by such obligation which was purely personal with the contractor himself.

19. By this debt also the heirs could not be benefited. Hence they were thought fit to be exempted.

20. The reasons were perhaps the same as in the case of surety and commercial loans.

21. The same explanation has been given by Haradatta also.

younger brothers as their father. But it seems that Gautama prefers partitition, as it leads to increase religious merit by the multiplication and frequency of domestic and religious ceremonies in the form of fire-worship and other rites.[22] He has given details about the rules of limited primogeniture, ultimogeniture and the shares to be given to the middlemost and other brothers. The eldest son shall get 1/20th more and some other specific property. For the middlemost and the youngest also there is specific provision for certain special kinds of property. All the remaining property was to be divided equally among all the brothers. As an alternative proposition, Gautama says that the eldest son may take two shares. He also makes distinction in the additional share in case the eldest son is born of the first married wife or of later married wife,[23] or wife of the same caste or of a different caste.[24] Regarding the order of succession, Gautama lays down that a legitimate son, a Kṣetraja son, a dattaka son, a son, made, a son, born secretly and a son, abandoned are entitled to inherit the property of their fathers. On failure of the legitimate sons and the secondary sons, just enumerated above, the rest of the secondary sons are to get one-fourth of the estate. Sapiṇḍas up to the sixth degree, sagotras, samāna-pravaras and the wife are to inherit the property of the deceased when he dies without any issue. The Śrotriyas shall divide the estate of childless Brahmins. The king shall take the property of other classes of persons on failure of heirs.[25] If after partition, any of the separated brothers dies sonless, his property would got to the eldest brother in case there was no re-union.[26] But if there was re-union after separation, the re-united coparcener alone would get the property of a re-united coparcener if he dies without a male issue. A son, born after partition, will take the entire property left in the hands of or acquired by the father after the partition.

10. Strīdhana, gains of learning and maintenance

Strīdhana was to be inherited first by unmarried daughters of the women and on their failure by their married but poor daughters. After the death of the father, the śulka or fee received by him at the time of his daughter's marriage shall go to the son, if the wife be dead. According to another view, the brother would get the śulka by way of inheritance even in case their mother is alive. But according to Haradatta, if the

22. Colebrooke, Dāyabhāga, III, 1, 15 ; V, Digest. 47.
23. Gautama, XXVIII, 14-17 ;
24. Ibid, XXVIII, 35-45.
25. The principle of escheat was recognised from the earliest period of Hindu Law.
26. The effect of re-union is different in the Mitākṣarā and the Dāyabhāga in some measure. The reason for preference of re-united full brothers to re-united half brother is not based on religion or spiritual efficacy. It is supposed to be based on quasi-contractual relation and mutual affection for each other, (Akshay Vs. Haridas, 35 Cal. 721).

mother is alive, the śulka must go to her.[27] The gains of learning could be withheld at pleasure by the acquirer from his unlearned coparceners[28] who were to divide their acquisitions equally among themselves, presumably on the ground that as all the coparceners were in this case more or less equally unlearned without any special knowledge or equipment; hence, equal division could not mean any injustice or inequity. An idiot and a eunuch were entitled to maintenance. The male issue of an idiot could claim inheritance through his father. This is the principle of representation which was recognised very early in the Hindu society.

11. Crimes

Gautama prohibits a student from taking alms from an Abhiśasta or an outcaste. He does not define the former term but enumerates certain offences which are reponsible for "pātitya". Some of these offences are again included in the category of mahāpātakas. From this, Haradatta concludes that an Abhiśasta is one who commits minor offences or upapātakas.[29] The original conception of crimes in Hindu Law must have begun with the violation of religious and social rules followed by elaborate enjoinments of prayaścitta, as it has been said by Dr. Sen Gupta as well.[30] It was for this reason that the offenders also had to propitiate the Deity Varuṇa for their offences, (Gautama XXV, 7, 9).

12. Offences against the Brahmins

A man accusing a Brahmin of a crime will be deemed to have committed a similar crime himself ; and in case of the Brahmin's innocence, his guilt will be regarded as doubly sinful. A man who out of wrath assaults a Brahmin with hand or any weapon will be banished from heaven for one thousand years ; and if blood falls from the body of a Brahmin, he will lose heaven for a number of years equal to that of the particles of dust that will be connected together by blood spilt. A Brahmin[31] who is not otherwise permitted to use weapons and arms can do so when his life

27 Colebrooke, Dāyabhāga, IV, 3, 27 ; V, Digest, 511 ; Mayūkha, IV, 10, 32.

28 The opposite view also was advocated even up to recent times. But the question was settled once for all by Hindu Gains of Learning Act (Act XXX) of 1930, which accepts the view of Gautama.

29. The conclusion is not in consonance with the view of Āpastamba (1, 7, 21, 7 and 1, 1, 3, 25).

30. Evolution of law, p. 77.

31. The king and the Brahmins are supposed to uphold the world. They are responsible for the maintenance of the different castes and the orders (Varṇās'rama). The position of the Brahmins was so much exalted and that of the S'ūdras so much despised that it was provided by Gautama that a Brahmin, in order to defray the expenses of a wedding or the performance of a rite, was entitled to take money from a S'ūdra even by force or by fraud. (Gautama XVIII, 31).

is threatened, in the exercise of his right of private defence. If a man receives or retains stolen property, he will be treated as a thief.[32] A woman who would commit adultery with a man of lower caste would be caused to be devoured by dogs; the adulterer also shall be killed. A man who has stolen gold shall approach the king with a club proclaiming his deed. He is purified, if he is slain or pardoned by the king. If the king does not strike, the guilt falls upon him, (Gautama XII, 43-46). It is quite clear from the above that the earliest conception of crime and punishment was a blending of religion and law.

13. Procedural law, punishments and the duty of the king

Excessive corporal punishment for students was prohibited in ancient India, as in Rome. Reasonable chastisement and punishment with a thin rope or a thin cane was permissible. In case of excessive punishment, the teacher was to be punished by the king. A Brahmin, learned in the Vedas, could not be subjected to corporal punishment,[33] imprisonment, fine, reviles or ex-communication. As regards the distribution of booties, chariots and riding animals were to go to the king. The king was to vouchsafe protection for the subjects in lieu of the taxes that were received by him. Lost articles and treasure-trove[34] were to be announced to the king and would belong to him except in case of finds by Brahmins. The king is the master of all except the Brahmins. It is his duty to protect the castes and orders, in accordance with the principles of justice. The king shall decide cases of disputes by taking into consideration the rules and conventions of particular communities and corporations. Reasoning also is an important means of arriving at the truth. In cases where evidence is conflicting, the king shall try to ascertain the truth from the learned Brahmins[35] and give the decisions accordingly. Daṇḍa, derived from the root 'dam' means restraint. The award of punishment must be governed by a consideration[36] of the status of the accused, his bodily strength, the nature of the offence

32. Cf. The provisions of sections 411 and 412 of the Indian Penal Code.

33. Gautama, VIII, 13. Elsewhere, (XII, 46-47), Gautama provides that banishment and branding are the punishment for Brahmins for preventing the repetition of the crime and publicly proclaiming the same.

34. Gautama refers to the opinion of some others, without mentioning their names, giving one sixth of the find even to a finder not belonging to the Brahmin caste, (XII, 44).

35. Gautama does not mention any ordeal. But at the same time, he refers to some superhuman powers that might be residing in a learned and virtuous Brahmin. This is, of course, another way of appealing to supernatural power for coming to the truth in a difficult case—where there was no clear evidence.

36. This is true even of the modern courts of justice.

and whether the offence was repeated;[37] or a pardon also might be given according to the decision of the assemblage of people.[38] If the stolen property is not recovered, the king shall compensate the loss from the treasury, (Gautama X, 47)

14. Lex talionis

A Śūdra deliberately and intentionally abusing a twice-born man and assaulting him with blows shall be deprived of the offending[39] limb. Again if a Śūdra has intercourse with a woman of the higher classes, his organ shall be cut and his property confiscated. If the woman was properly protected, in that case he shall be executed. The caste system played a very important part both in civil and criminal law of the ancient Hindus.[40] Thus according to Gautama, if a Śūdra intentionally listens to the recitation of the Vedas, his ears shall be filled with molten tin or lac; if he recites the Vedas, his tongue shall be cut off and if he retains in his memory any portion of the Vedas, his body should be split in two parts. And if he in any way assumes the position of the twice-born classes, he shall be punished corporally.

15. Witnesses

In disputed cases[41] truth shall be ascertained with the help of the

37. The Indian Penal Code also provides for enhanced punishments for criminals with previous convictions.

38. This appears to have been a prerogative of the people, who in appropriate cases, might exercise the right of pardon.

39. Extreme forms of lex talionis were to be found in the Code of Hammurabi. Vide sections 229, 230, 209, 210, 116.

"The code of Hammurabi and Moses" by W. W. Davis, reprinted in the Evolution of the law Series, Vol. 1).

The above refer to the extreme illustrations of lex talionis—son for son, daughter for daughter. The Hebrew law also inflicted the death penalty but not on the innocent child of the perpetrator, but direct on the guilty person. According to the laws of the Hebrews, "The father shall not be put to death for the children, neither shall the children be put to death for the fathers. Every man shall be put to death for his own sin". (Dent. 24 : 16).

40. Punishments were to vary according to the difference in castes of the parties. But one of the happiest features of the ancient Hindu Law was that the punishment would be highly increased, if any offence was committed by a learned and respectable man. It was thus expected that those who were more learned and better placed in the society must be subject to some additional liability to behave more appropriately and humanely towards others; the case of the S'ūdras was perhaps diff rent. Thus a Brahmin abusing a S'ūdra was not to undergo any punishment at all, (Gautama XII, 4-17). A S'ūdra guest also had to work for his meals. (Āpastamba 2, 4, 19).

41. Both civil and criminal.

witnesses who must be more than one in number[42] and who may be even Śūdras, specially in a criminal case. A witness must not speak unless summoned or asked to do so. A witness becomes guilty when he does not speak being asked to speak. In case of false evidence, the sin falls on the king, the assessors, the witnesses and the accused persons. Gautama also refers to the views of others according to whom the witnesses shall be charged to speak on oath which must be sworn before gods, Brahmins and the king, in case of Non-Brahmin witnesses. Gautama, then, enumerates the sins committed by witnesses, giving false evidence, respecting different objects.[43] But no guilt is committed, if a witness tells a lie for saving the life of a man who is not very wicked or dishonest. The litigants shall humbly seek adjudication.[44] The defendant shall give reply as early as possible, in as much as, delay will go against him.[45] To speak the truth as a witness was one of the highest virtues.

16. Āpastamba

After the Gautama Dharmasūtra, comes the Āpastamba Dharmasūtra. Though according to the usually[46] accepted theory, Baudhāyana comes before Āpastamba, I think the order of these two Sūtra-writers should be reversed Dr. Bühler contended that Baudhāyana was earlier than Āpastamba. But Kane has fully discussed and refuted all the arguments advanced by him.[47] There are also many striking coincidences between Āpastamba and the earliest Sūtra-writer, Gautama.[48] According to the Tantravārtika[49] of Kumārila also, the present Baudhāyana is later than the present Āpastamba.[50] Āpastamba, first of all, refers to Samaya or agreement of men learned in law.[51] According to him explicit revealed texts have greater force than customs which presuppose Vedic texts. Of the four castes, the Śūdras are the most despised of all and they were meant for serving the

42. The Indian Evidence Act also does not insist on the number.

43. Gautama, XIII, 14-23.

44. Litigation was never to be encouraged by the king or the judge.

45. This was one of the most important and helpful of the practical expedients for testing the bonafide of the contention of the defendant.

46. Mayne, Hindu Law and Usages, p. 22.

47. History of Dharmas'āstras, Vol. 1. pp. 29-30.

48. For illustrations, see Ibid, p. 40.

49. Ibid, p. 27.

50. Numerous Sūtras are identical in Baudhāyana and Āpastamba. For illustrations see Kane's History of Dharmas'āstra, Vol. 1, p. 30. Thus considering the texts of Gautama, it appears that Āpastamba flourised after Gautama and before Baudhāyana.

51. According to Jayawal also, Āpastamba's Dharmasūtra is pre-Paninian in language and oldest in form. According to him, Gautama also is posterior to Āpastamba (Manu and Yājñavalkya, pp. 3-4).

other three castes. Even when a Śūdra becomes a guest in the house of a twice-born man, he must be made to do some work, before he is given food.[52] A Brahmin of ten years is like the father of a Kṣatriya of hundred years.[53] Āpastamba refers to many foregoing authorities, both named and un-named. By name, he refers to Manu, Hārīta, Kanva, Kautsa, Puṣkarādi and others. He prohibits food to be taken from a usurer or a physician.

17. Civil law—marriage and sonship

Sagotra marriage and marriage within prohibited degrees were forbidden by Āpastamba. But it is not quite clear from the Sūtra, as to what is precisely[54] meant by the prohibited degrees. Six forms of marriage only have been enumerated by him.[55] The quality of the son also depends upon the quality of the marriage.[56] Āpastamba does not recognise any secondary son—not even the dattaka son. According to him, sale or gift of a son is not recognised at all. He is also against primogeniture[57] and insists on equal distribution of father's wealth among the sons. Some choice objects, of course, might be given to the eldest son for gladdening him. On failure of sons, the property was to go to the Sapiṇḍas ; on the failure of the Sapiṇḍas, to the spiritual teacher ; on failure of the spiritual teacher, to a fellow student;[58] or the property also might go to the daughter,[59] the wife[60] not being mentioned at all. Ultimately, on failure of all the heirs enumerated, the king was to take the property. But a son was to be the eldest son. No division of property could take place between the husband and the wife.[61]

18. Criminal law

In Āpastamba there was an admixture of sins and legal crimes on the

52. Āpastamba, II 2, 4, 9.

53. Ibid, 1, 4, 14, 25.

54. Ibid, II, 5, 11, 15-16.

55. The Pais'āca and the Prājāpatya forms have been omitted. The Brāhma, Daiva and the Ārṣa have been declared as praiseworthy, each preceding one being superior to the one following.

56. Āpastamba, II, 5, 12, 4.

57. Ibid. II, 6. 14, 6-14.

58. The order of succession, as given by Āpastamba, was very brief. No secondary sons were recognised by Āpastamba

59. The daughter naturally occupied a prominent position, as no secondary sons were recognised by Āpastamba.

60. The wife was not given any recognition except that she was entitled only to wealth and ornaments, received by her from the relations of her father's side.

61. According to the Hindu conception of marriage, the husband and the wife get their identities merged in each other.

the one hand and legal punishment on the other. This was more or less true of all the ancient writers on Dharma.[62] A man who has killed a Kṣatriya shall give one thousand cows to Brahmins for the expiation of the sin; for killing a Vaiśya or a Śūdra, he must give one hundred or ten cows respectively along with a bull in each case. Āpastamba defines Abhiśasta and enumerates the offences which render the offenders Abhiśasta.[63] Then he goes on to prescribe the penance and the mode of living for an Abhiśasta.[64] A man who has slain a guru or a Brahmin, who has studied the Veda or finished ceremonies of a Soma-sacrifice must live in the condemned way until his death; he can never be purified in his life-time and his sin is removed only after death.[65] A thief must be punished by the king,[66] when the former appears before the latter with a club in his hand proclaiming his guilt. The Mahāpātakas also have been enumerated by him and they are supposed to be based on a quotation from one of the Purāṇas according to Haradatta. Any Non-Brahmin killing a Brahmin, becomes pure, if he is killed in the battlefield or if he burns himself. For killing a Śūdra, the same penance has been prescribed as for killing a crow, a chamelion, a peacock or any small animal.[67] Vākpāruṣya (abuse) and daṇḍa Pāruṣya (hurt or assault) have been referred to by him along with the penances therefor.[68] Varuṇa also shall be propitiated for commission of sins and offences.[69] Usury,[70] conhabitation with a Non-Aryan woman and drinking of spirituous liquor are also regarded as offences for which penances have been provided for by Āpastamba.[71] A guilt becomes heavier[72] if it is committed intentionally. Āpastamba refers to a Purāṇa, in providing for the right of private defence, in order to meet wrath with wrath.[73] No guest shall approach a criminal, as in that case the sin

62. For reasons, see Dr. Sen Gupta's observations, Chapter IV, 12.

63. 1. 9. 24. 6-9. To kill any Brahmin, (even though only in name), a Kṣatriya with learing and initiation, an embryo, or a woman, make a man Abhis' asta

64. Āpastamba, 1, 9, 24, 10-24.

65. Ibid, 1, 9-24, 25.

66. Cf. Gautama, XII, 43-46.

67. Āpastamba, 1, 9, 25, 13. This Sūtra goes to illustrate the most despicable position of the S'ūdras in the ancient Hindu society.

68. Ibid, 1, 9, 26 3, 6.

69. Ibid, 1, 9, 26, 7.

70. Usury was regarded as a cause of degradation and hence to take food from a usurer was prohibited, (Āpastamba, 1, 16 18, 22).

71. Ibid, 1 10, 9, 27.

72. Ibid, 1, 10, 29, 3.

73. Ibid, 1, 10, 29, 7.

of the criminal comes to the guest.[74] Persons accused of attempts and abetments of offences are to be punished in hell according to the magnitude of the offences.[75]

19. Procedural law, punishment and the duty of the king

A sort of joint responsibility has been imposed on the king and his Purohita by Āpastamba, for cases where people transgress the orders of their spiritual preceptors.[76] The transgressors shall be taken to the king who will send them to the domestic priest with learning for necessary chastisement and punishment.[77] This was meant exclusively for the Brahmins.[78] But for the other castes, the king was to adjudge the offence on evidence etc. and then punish according to law. If a king does not punish the offender, the guilt falls on him. The king's servants[79] also who were entrusted with the protection of the subjects, were to compensate for the stolen articles which could not be recovered. To be a judge or an assessor, a man must be learned in the Vedas, of pure and noble descent, of sufficient age, skilful in reasoning and obedient to the manifold duties of the caste and the orders. In doubtful cases, truth shall be ascertained by means of inference and other tests such as cross-examination, as it has been suggested by Haradatta. A witness also, to be reliable, must possess many good qualities, such as, truthfulness, learning, submission to the Vedas, and good descent etc. He must depose before Fire, Water or the King. An untruthful witness must be punished by the king. Besides the king's punishment, there was also punishment or torture in hell after death. On the other hand, a truthful witness is respected in this world and is rewarded in heaven after death. There was also a very peculiar provision made by Āpastamba[80] according to which any one of a spiritual preceptor, an officiating priest, a Snātaka or a prince could release an accused person

74. Ibid, 1, 7, 20, 15.

75. Ibid, II, 2, 29, 1.

76. This admixture was to some extent bound to take place, as in almost every case the offences were quasi-legal and quasi-religious in character.

77. Āpastamba, II, 5, 10, 12-16.

78. The consideration of caste played a very important part in the award of punishment. A man of the higher caste, committing adultery with a woman of the S'ūdra caste, was simply to be banished, whereas, a S'ūdra, committing the same offence with respect to a woman of the higher caste, was to suffer capital punishment. Similarly capital punishment was to be inflicted on a S'ūdra, if he was guilty of homicide, theft or misappropriation of property. The maximum punishment for a Brahmin, however, was banishment (Āpastamba, II, 10, 27 9-9. 14-19.)

79. Āpastamba, II, 10, 26, 4-8.

80. See Gautama, Ante, Chapter IV.

from punishment by their intercession. Position of women also was, generally speaking, far from enviable.[81]

20. Baudhāyana

As it has already been observed, Baudhāyana should be placed after Āpastamba.[82] Both of them are supposed to have belonged to the Black Yajur Veda and flourished in the Andhra country[83]. As the sources of sacred law, Baudhāyana refers to the Vedas, tradition (Smriti) and the practices of the Śiṣṭas. He also defines[84] who the Śiṣṭas are and refers to the Pariṣad and its constitution.[85] Learning was regarded[86] as the most important qualification for a man to become a member of the Pariṣad. Baudhāyana refers to the views of several writers and thinkers flourishing before him. According to one of these quotations, it has been figuratively said that what the Brahmins, riding in the chariot of law and weilding the sword of the Veda, propound even in jest, is declared to be the highest[87] law. The importance of a judicial decision by more than one man was appreciated even from a very early time, in as much as, inspite of the highest learning, one man might be liable to err, his judgment not being infallible. Omissions and commissions might be checked and corrected

81. Although Apastamba does not usually recognise the status of woman as very high in matters of inheritance and other things, still by the last Sūtra he makes a sort of residuary provision, when he says that in the opinion of some ones (not named), the rules of conduct which have not been expressly enacted herein must be learnt from men and women of all castes without any discrimination.

82. Vide Ante, Chapter IV.

83. Dr. Bühler, Sacred Book of the East, Vol. XIV, Introduction, p. 43 ; Ibid, Vol. II, Introduction, pp. 33-34.

84. Men are entitled to be called S'iṣṭas when they are free from envy, pride, cupidity, hypocrisy, arrogance, perplexity and anger and are contented with a store of grain only for ten days, (Cf. Gautama, Ante, Chapter IV).

85. According to Baudhāyana, the Pariṣad must consist of ten members; but he refers to the views of others also where the number varies from ten to one, learning being invariably insisted upon.

86. According to one of the views, quoted by Baudhāyana, an unlearned Brahmin has nothing in him except the name, like an elephant made of wood and an antelope made of leather. The same analogy was quoted also by Vas'iṣṭha. Identical passages quoted by a plurality of authors indicate that they might have been enshrined either in some literary embodiment or in some floating traditions already current.

87. Occasional reaction against the unreserved supremacy of the Brahmins also could be noticed, when learning was insisted upon as a *causa sine qua non* for recognising the status of a Brahmin as such. To study under a Non-Brahmin also was permissible in times of distress. (Baudhāyana, 1, 2, 3, 41).

by one another where there could be more than one judge or assessor.[88] Baudhāyana refers, perhaps for the first time, to the different customs of the North and the South.[89] He also gives a description of Āryyāvarta and names many countries, such as, Anga, Magadha, Saurāṣṭra, the Deccan, Upāvrit, Sindh and Souviras, where the inhabitants were of mixted origin. Different boundaries of Āryyāvarta also have been referred to. According to Jayaswal this depended on the geographical expansion of the Aryans at different times.

21. Civil law : usury

A Vaiśya alone is permitted to live on usury--the rate of interest being 15% *per annum*. Baudhāyana refers to some views[90] according to which usury had been very much depreciated so much so that being weighed in the scales, the slayer of a Brahmin remained at the top, whereas the usurer went downwards. But a very curious provision was made by Baudhāyana, when he says that Brahmins and Kṣatriyas also could lend money on interest to one who neglects his sacred and religious duties, to a miser, to an atheist ond to a very wicked man.[91] Thus the real character of of a juristic act was to be judged with reference to both the person of inherence as well as the person of incidence.

22. Inheritance and order of succession

Baudhāyana defined Sapiṇḍas and Sakulyas. His definition of Sapiṇḍas is exactly the same as that of Jīmūtavāhana. But regarding the word

88. Differences in opinion would always offer an opportunity for the fullest discussion and for the most correct decision.

89. Baudhāyana refers to the dispute which existed regarding the nature and acceptability of the different customs in the North and the South. These customs were found to have existed even by the later Smriti-writers like Brihaspati. And as a matter of fact, most of the customs, referred to above, are to be seen prevailing even in the modern times in the places concerned. These are clearly local customs binding only on the people of the localities in question. As opposed to these local customs, are the customs or the practices of the S'iṣṭas. Gautama, according to Baudhāyana, countenances only the latter and not the former. But Baudhāyana seems to be inclined towards the recognitions of local customs as well; for he emphatically asserts that the customs of Āryyāvarta are authoritative. To step beyond Āryyāvarta would make a man liable for sin to be got rid of by expiation alone. (Baudhāyana, 1, 1, 2).

90. According to one such view, the term usury has been used in a much wider sense. Thus a man buying articles at cheaper rates and selling them at higher rates was included in the category of usurers. Again a Brahmin living on usury was degarded as a S'ūdra. (Baudhāyana, 1, 3, 10, 23-24).

91. Ibid, 1. 5, 10, 25.

Śakulya there is some difference.[92] Regarding the order of succession, it has been provided that, at the first instance, the property of a deceased man shall go to his Sapiṇḍas, in default of the Sapiṇḍas to the Sakulyas, in default of the Sakulyas, to the spiritual preceptor and in default of the spiritual preceptor to the fellow pupil. And on the failure of all these, the property should go to the king, as the ultimate heir, excepting the property of a Brahmin which never escheats to the king.[93] The provisions for inheriting properties by perceptors and fellow students indicate the intimate bond of relation existing between ancient Hindu teachers and students based on the institution of studentship which was one of the most important stages of life in the most real sense of the term.

23. Marriage and sonship

Baudhāyana enumerates the eight usual forms of marriage subdividing the first four as lawful for the Brahmins and the rest as sinful. He also advocates relative superiority of the different forms of marriage within the selfsame subdivision.[94] Of course, in the opinion of some, at least, the Gāndharva rite was suitable for all castes, as it was based literally on affection. According to Baudhāyana, there are twelve kinds of sons including the Aurasa son who alone is entitled to inherit and become a member of the family to be competent enough to continue it. He also refers to the views of Aupajandhani who has already come to learn that a son, begotten by a stranger belongs to him in the world of Yama—a fact which was sufficient to discourage the institution of appointment.[95]

92. According to Jīmūtavāhana, the Sakulyas are the three ascendants and the three descendants in the male line after the Sapiṇḍas. But no such restrictions was imposed by Baudhāyana who means and includes by the term Sakulya all ascendants and descendan's excepting only the Sapiṇḍas. Govindarāja also seems to agree with Baudhāyana in not imposing any arbitrary restriction on the degrees of ascent and descent.

93. The property of a Brahmin has got to be shunned as the worst poison, according to a quotation referred to by Baudhāyana : ordinary poison kills one man only, but the poison in the shape of a Brahmin's property kills a man along with his descendants. (Baudhāyana, 1, 5, 11, 16).

94. The arrangement in order of merit is Brāhma, Prājāpatya, Ārṣa, Daiva, Gāndharva, Asura, Rākṣasa and Pais'āca. Among these the sixth and the seventh are suitable for the Kṣatriyas, the fifth and the eighth for the Vais'yas and the S'ūdras, though these two classes of people are supposed to be not very particular about the selection of their wives. (Baudhāyana, 1, 11, 21).

95. There was a heated controversy regarding the property of having a secondary son by appointment. The practice of Niyoga was depreciated by many other writers on Dharma also.

24. Guardianship, maintenanc and strīdhana

The properties of minors should be protected and the blind, idiot and the diseased should be maintained. An outcaste or his off-spring is not entitled to any maintenance. But an outcaste mother must be maintained without speaking to her. The daughters shall inherit the ornaments only and no other properties of their mothers. The term strīdhana was neither defined nor used. The definition and its precise scope were reserved for later Smitri-writers, such as, Manu and Yājñvalkya, with commentators. Women were declared unfit for independence and this contention was supported by an oft-quoted verse of which the purport is that a woman is protected in childhood by her father, in youth by her husband and in old age by her son; and hence she never deserved independence. Nothing is known for certain about the authorship of the verse referred to. From the nature of the way he refers to the verse, Baudhāyana at least cannot be regarded as its author. The subsequent writers also use the verse in the same way without indicating anything about its real authorship. This is not the only verse of its kind. It is one of the characteristic features of the Smṛiti-literature that indications are often lacking as to which text is original and which text is a mere quotation or reproduction from others. The verse, referred to above, might, however, mean only a figurative statement indicating the different important stages in a woman's life. Baudhāyana refers to the different views regarding primogeniture which is countenanced by him also, to some extent, though it does not cleary follow from his text. The nature of the additional share also is not definitely ascertainable. There was different provision for the different shares according as the different sons were born of different wives, (Baudhāyana, II, 2, 3.).

25. Criminal Law, punishment and the king

The king is to protect the subjects in lieu of the sixth part of their income or merit which he receives as his remuneration. He must be guided by the instruction of his domestic priest who shall be foremost in every transaction. As regards the right of private defence, it has been said that it is no crime to kill an assassin even though he may happen to be a learned Brahmin. Reference has been made to the oft-quoted verse according to which fury recoils upon fury. A Brahmin cannot be subject to corporal punishment even in cases where he may have committed the Mahapātakas like killing a Brahmin, violating the Guru's bed, stealing gold and drinking spirituous liquor ; a Brahmin could only be banished from the kingdom.[96] But if a Kṣatriya, Vaiśya or a Śūdra slays a man of his own caste or of any

96. Baudhāyana, (I, 10, 19, 17-18).

lower caste shall be suitably punished by the king.[97] Different punishments have been prescribed for accused persons who have killed persons of different castes, women, cows and other animals. Baudhāyana also says that for the killing of flamingo, a peacock, a crow, an owl, a frog, a muskrat and a dog etc., the same fine shall be imposed as for the killing of a Śūdra.[98] Evidence shall be direct and not based on hearsay[99] or falsehood. False testimony leads to injustice which involves all persons connected with the administration of justice. Baudhāyana has quoted verses which refer to the sins committed by an untruthful witness who becomes responsible for the destruction of his ascendants and descendants and the loss of his entire religious merit. The king, Śrotriyas and ascetics are not to give evidence in cases. Varuṇa[100] shall not seize an offender who practices penances at the twilight of the evening.

26. Vaśiṣṭha

The Dharmasūtra of Vaśiṣṭha comes after that of Baudhāyana. Both these works have many points of resemblance which indicate, in a sense, the proximity of their time. Both the authors indulge in quotations from others and discussions of others' views. This very fact goes to prove that they flourished later. But though quotations and references abound in these two Sūtra works, still on many occasions indications are lacking that they are quotations at all. Hence, sometimes it becomes difficult to discriminate which is original and which is a mere quotation. Though Vaśiṣṭha has many points in common with Baudhāyana and the other two Sūtra-writers, viz., Gautama and Āpastamba, still Vaśiṣṭha claims some new topics and concepts with more elaborate and systematic treatment. Thus suicide and unnatural offences as crimes are to be found in Vaśiṣṭha alone. As regards evidence also, he refers to documents and possession besides witnesses. The most important and expedient means of adjudication that has been referred to by Vaśiṣṭha is the consultation of the opinions of the village-elders in deciding local disputes. The Grāma-Bṛddhas might indicate the rudiments of the jury system at a very early date. Vaśiṣṭha

97. Ibid, 1, 1, 1, 15. Here the author quotes a verse according to which punishment should be inflicted after taking into consideration the constitution, the strength, the knowledge and the age of the accused person and the time and place of the alleged offence.

98. Similar provision is made by Āpastamba also, 1, 9, 28, 13.

99. The importance of direct evidence was appreciated very early by the Hindu jurists.

100. Hence, the mercy of Varuṇa should be invoked by the offenders. The deity Varuṇa has been invariably connected with sin and expiation according to almost all the Smṛiti-writers.

is supposed to have been connected with the Ṛgveda.[101] But it is doubtful if he could be exclusively associated with this Veda.[102] Originally there might be some special features of the teachings of the different Vedic Saṃhitās. These peculiarities, if any, were perhaps fully retained in the Śrauta-sūtras also ; but in the Gṛhya-sūtras, the distinctions were becoming more and more insignificant, as the domestic rights and duties enjoined by the different Gṛhya-sūtra were essentially, if not entirely, the same. And ultimately with the Dharmasūtras, the distinctions became almost imperceptible, as the topics dealt therein were more with the secular conduct than with the religious one. Vaśiṣṭha refers to the revealed texts, the traditions of the sages and the practices of the Śiṣṭhas[103] as the sources of sacred law for which no wordly cause must be perceptible. According to Dr. Bühler, the Sūtra (1, 7.) imposes a limitation on Sūtra (1, 5) also indicating that the customs of the Śiṣṭas for which wordly motives were perceptible had no authority and as such were not to be followed—"the principle enunciated is one inculcated by the Mīmāṃsakas."[104] Vaśiṣṭha also refers to pariṣad and its constitution, (III, 20). Like Baudhāyana, he also refers to the boundaries of Āryyāvarta and the validity of the customs prevailing therein. The caste system also has been viewed with the same attitude, as in cases of other Sūtra-writers. Thus the Śūdras were meant to serve the other castes and the Brahmins[105] were placed even above the king who was to administer the kingdom on the instruction of the former. Vaśiṣṭha refers to Manu for more than half a dozen times and to Hārīta only once.

27. Civil law—marriage and sonship

Vaśiṣṭha enumerates six kinds of marriage.[106] He also permits Anuloma marriage with the prohibition of a Śūdra wife for a Brahmin, as such a marriage causes degradation of the family and the loss of heaven after death. He coins new terms for the Asura and the Rākṣasa forms which

101. Jolly, Law and Custom, 13 ; Kumārila also says that the Dharmasūtra of Vas'iṣṭha was specially studied by the students of the Ṛgveda, but that like other Dharmasūtras, it was authoritative for all caraṇas.

102. See Kane, History of Dharmas'āstra, Vol. I, p. 50.

103. A S'iṣṭa has been defined as one whose heart is free from desire. (Vas'iṣṭha 1, 6).

104. The principles of interpretations as enjoined by the Mīmāṃsā philosophers are to be found frequently in Vas'iṣṭha as well as Baudhāyana. These are additional indications showing their comparatively recent composition.

105. By a Brahmin is meant a Brahmin with learning, as a Brahmin without learning is like an elephant made of wood, or an antelope made of leather. The same figure was used by Baudhāyana also.

106. The Prājāpatya and the Pais'āca forms are omitted by him.

are respectively known as the Mānuṣa and the Kṣātra forms. Vaśiṣṭha also quotes the oft-quoted verse[107] according to which a woman never deserves independence. Pratiloma marriages and the confusion of castes also have been referred to, (XVII, 1-6). There is also reference to harlots[108] from whose hands no food should be taken. He recommended child-marriage.[109] Vaśiṣṭha refers to twelve kinds of sons, as enumerated by the earlier sages and noticed in the Purāṇas. He also quotes several verses from the Vedas to show the importance[110] of having sons. Thus according to one of the Vedic verses, a Brahmin is born subject to threefold debts—debts towards Gods, debts towards ancestors and debts towards the sages.[111] As regards the Kṣetraja son, Vaśiṣṭha refers to the different views, advocated respecting the ownership of a son, born as the result of appointment. According to one view, the son belongs to the begetter and according to the other view, he belonged to the husband of the woman. But Vaśiṣṭha seems to be silent about the discrimination of possession of such a son in this world and in the world of Yama. An appointed daughter has been characterised by him as the third kind of son. Regarding this identification of the son and the daughter, the remarks of Dr. Bühler are very interesting.[112]

107. For comment on the verse, see Ante, Chapter III, 24.

108. Vas'iṣṭha, XIV, 10

109. A daughter should be given in marriage even when she runs about naked. This is from a quotation by Vas'iṣṭha (XVII, 70). A girl who is not given in marriage within three years after the attainment of puberty, is at liberty to choose her own husband. By the expression "naked" emphasis has been laid on early marriage only figuratively. The word need not be taken literally.

110. The father is supposed to throw his debt on the son and attain immortality when he sees the face of a living son. According to the Vedas, a man blessed with a son is entitled to endless heavenly bliss, whereas a sonless man is without any place or region whatsoever. According to anothor text of the Vedas, through a son, a man conquers the world, through a grandson, he attains immortality and through a great grandson, he gains the world of the sun. (Vas'iṣṭha, XVII, 1-5).

111. The threefold debts are got rid of by offering sacrifices, by begetting a son and by reading as a student under a preceptor.

112. "The curious fact that Vas'iṣṭha here calls the appointed daughter a son, may perhaps be explained by a custom which, though rarely practised, still occurs in Kashmere and by which a brotherless maiden is given a male name. An historical instance of this kind is mentioned in the Rajatarangini, where it is stated that Kalyāna Devī, princess of Gauḍa and the wife of king Jayāpīḍa was called by her father Kalyānamalla. When I collected this passage with the help of a Kashmerian, I was told that a certain Brahmin, still living in S'rīnagar has changed the name of his only child, a daughter, called Amri to the corresponding masculine form Amaryu, in order to secure to himself through her, the spiritual benefit, as if he had a son. It seems to me not improbable that Vas'iṣṭha's sūtra alludes to the same legal fiction and that he recommends in the first instance that the father is to make his daughter a son by changing her name and next to secure for himself her son by the verse quoted in Sūtra XVII",—The Sacred Book of the East, Vol. XIV, pp. 85-86.

28. Inheritance and partition

Of the twelve kinds of sons, the first six are to be treated as kinsmen as well as heirs, whereas the other six are to be treated simply as kinsmen and not as heirs. According to one quotation, the later group can inherit only in absence of the former.[113] Ordinarily inheritance, first of all, goes to the first group of the sons, then on failure of them to the Sapiṇḍas or the sons of the second group,[114] on failure of them to the teacher and the pupil[115] and on failure of all these, the king takes the property as the ultimate heir, excepting the property of a Brahmin which must be avoided as the worst kind of poison.[116] According to Vaśiṣṭha no partition among brothers should take place until[117] those widows who have not offspring but are supposed to be pregnant give birth to sons. He prescribes double share for the eldest one along with some species of properties for the eldest, the youngest and the middle-most[118] son. The shares of a Brahmin's sons shall vary according to the different castes of the mothers of whom they are born.[119] If a brother has earned anything by his own labour, he shall be entitled to a double share of the same. Persons who have entered different orders of religion, eunuchs, mad men and outcastes are excluded from inheritance. The eunuchs and the mad men are, however, entitled to maintenance. The daughters are entitled to divide the nuptial presents of their mothers.

29. Usury and debts

According to the rule of Vaśiṣṭha,[120] a Brahmin and a Kṣatriya are not allowed to lend money or anything else on interest and act as usurers—except in cases where the borrowers entirely neglect their religious duties and are exceedingly wicked. He also gives some details regarding the rates

113. Vas'iṣṭha, XVII, 38-39.

114. Ibid, XVII, 81 ; Gautama, XXVIII, 21 ; Viṣṇu, XVII, 10.

115. Vas'iṣṭha, XVII, 82 ; Āpastamba, II, 6, 14, 3.

116. Vas'iṣṭha, XVII, 84 ; Baudhāyana, 1, 5, 11. 16.

117. Vas'iṣṭha does not say anything explicitly about the presence or absence of the parents. It appears that, as he speaks of partition among brothers only, the parents are presumably dead and that partition can take place only after the death of both the parents.

118. Gautama, XXVIII, 9 and 5-7.

119. Vas'iṣṭha, XVII, 47-50 ; Viṣṇu, XVIII, 1-5.

120. Almost similar provision was made by Baudhāyana who specifically mentions that the Vais'yas alone can live on usury. Like Baudhāyana, Vas'iṣṭha also quoted the verses according to which usury has been used in a wider sense of the term and the crime of usury has been described as more heinous than even the killing of a Brahmin. (See Ante, Chapter IV, 20).

of interest of several other articles of loan besides money.[121] He also quotes some verses according to which the rates of interest will vary according to the caste of the borrower ; interest of money shall stop with the death of the king only to be revived again after the coronation. He also quotes a verse[122] according to which the immoral debts of a deceased person need not be paid by the heirs. The types of immoral debts had already been enumerated by Gautama who also declares the heirs as free from the liability of such debts.[123]

30. Adverse possession

Vaśiṣṭha quotes different verses showing the application of the principle of adverse possession. According to one such verse, enjoyment by a stranger for ten years, of properties inherited from a father, a thing bought, a pledge, the property given to a wife after marriage by her husband's family, a gift, the property obtained for performing a sacrifice, the property of a re-united coparcener and wages are lost to the owner[124]. He also quotes another verse according to which some properties, such as, a pledge, a boundary, the property of minors, an open deposit, a sealed deposit, women, the property of a king and the wealth of Śrotirya are not lost by adverse possession.[125] Properties given up by the owners or properties of which the owners cannot be traced belong to the king or shall be administered by the king or his officers. A king surrounded by honest and intelligent officers is superior even to a Brahmin.[126] An efficient administration of the kingdom also is not possible without vigilant and helpful subordinate officers. Greedy officers had been compared with vultures.

121. Perhaps from the details of rates of interest given by Vas'iṣṭha, the subsequent writers were led to think that it was Vas'iṣṭha who was responsible for the enunciation of the rate of interest at 15% *per annum*. But as it has already been noticed, he might not have been the original propounder of the rate of interest. (See Ante, Chapter IV, 6).

122. This verse is abruptly quoted by Vas'iṣṭha while discussing the legal procedure specially with reference to the witnesses. (Vas'ṣtha XVI, 31).

123. Gautama, XII, 41.

124. Vas'iṣṭha, XVI, 16.

125. Ibid, XVI, 19-20.

126. Both a king and a learned Brahmin occupied a very high and exalted position in the ancient society not only on account of their exalted status but also by their readiness to serve the people ungrudgingly. Sometimes the Brahmins are made superior to the king when the latter is asked to administer the kingdom according to the rules, enunciated by the Brahmins. (Vas'iṣṭha, 1, 40-41).

31. Criminal law

Vaśiṣṭha, like other Smriti-writers, refers to the traditional[127] enumeration of the five mortal sins or Mahāpātakas, such as, violating guru's bed, drinking spirituous liquor, slaying a learned Brahmin, stealing the gold of a Brahmin and associating with the outcaste. He also recognises the traditional right of private defence against the assassins (Ātatāyins)[128] including even learned Brahmins—with the help of arms, if necessary. Brahmins and Kṣatriyas are allowed to take up arms not only in exercising their rights of private defence, but also in the prevention of confusion of castes in the society. Vaśiṣṭha refers to the Abhiśastas and their penances which, to some extent, served as a sort of supplement to the legal modes of punishment. Unnatural offence and suicide[129] have been referred to by him for the first time. Besides open penances, he also provides for secret penances like Baudhāyana.

32. Procedural law, punishment and the king

The king shall govern the different castes according to the rules provided for by the Brahmins. For the protection, vouchsafed by him, the king is entitled to exact one-sixth of the subjects' wealth as tax excepting from the Brahmins who must not be put to any inconvenience by the acts of the king. According to a Vedic text, a realm where a Brahmin is appointed domestic priest prospers. It is the duty of the king to see that the people of the different castes fulfil their particular duties according to the laws of the countries, castes and families. Punishment should be inflicted on those who violate any rule of conduct. If any offender goes unpunished, the guilt falls upon the king and the priest who are enjoined to practise some penances.[130] The king should be careful in seeing that guilty persons are duly punished and the innocent persons are not harassed in any way. In

127. Regarding most of the topics, it is seen that the same idea and not infrequently the same language is used by more than one author, without giving any indication as to who was the original author of the texts in question. This type of verses and texts is naturally multiplied as time passes and there remains very little regarding which originality can be claimed by any particular author. This was particularly true of ancient India where learning used to be imparted and spread more by oral instructions than by the help the art of printing.

128. A definition of Ātatāyins has been quoted by Vas'iṣṭha, (III, 16).

129. A man is said to commit suicide when he kills himself by means of wood, water, clod of earth, stones, weapons, poison or a rope. No funeral rites are to be observed by the blood relations of a man who commits suicide. If any such religious rites are undergone out of affection, the penance of Cāndrāyaṇa shall be performed along with Taptakṛcchra, (Vas'iṣṭha, XXIII, 14-23).

130. Vas'iṣṭha, XIX, 40-43.

awarding punishment, in cases of abuses and assaults, the time and the place of the offences and the status, age and learning of the accused persons must be taken into consideration. None should injure even a tree or plant wantonly. The king should administer justice with the help of his ministers without being partial to any of the parties and after paying due consideration to all the facts and the circumstances of the caste. Documents,[131] witnesses and possession are the three means of proof. He also refers to some most expedient[132] methods of ascertaining truth through the neighbours and the old men of the locality. These are definitely original contributions made by Vaśiṣṭha. The order of preference also among the different expedients is very significant. Śrotriyas and men with unblemished appearances and good character are undoubtedly the best witnesses. But in cases where they are not available, an ordinary man also may become a witness[133] but preferably women should be witnesses for women, Brahmins for Brahmins, Śūdras for Śūdras and so on. He refers to many quotations which speak of the traditional conception of sin arising out of false evidence. By giving false or partial evidence, a man deprives not only himself of his religious merit in the present world and in the world hereafter, but also his ancestors. False evidence is permissible only in saving the wholesale destruction of property or for the sake of a Brahmin. He also enumerates the different degrees in the gravity of giving false evidence in respect of different species of properties and different classes of people.[134]

33. Concluding remarks on the Dharmasūtras

The foregoing Dharmasūtras, original and independent in composition, represent the earliest epoch in the Hindu legal history. There are of course many other Dharmasūtras also; but they cannot equal those already discussed in points of importance or celebrity. Thus some of them exist only in name and quotation;[135] some of them are mere compilations

131. Documents have been cited as a means of proof for the first time by Vas'iṣṭha.

132. In a dispute regarding a house or land, reliance should be placed on the neighbours. If the neighbours disagree, documents may be relied upon. In case of disagreement among documents, reliance should be placed on the elderly men of the village or the town who are expected to speak the truth from their own experience and learning, unperturbed by dishonesty or deception. (Vas'iṣṭha, XVI, 13-15)

133. Vas'iṣṭha does not say anything regarding the number of witnesses. Apparently he relies on the quality rather than the quantity of the witnesses.

134. For the different quotations, see Vas'iṣṭha, XVI, 32-36.

135. To this category belong the Dharmasūtras of Manu, Hārīta, S'ankha Likhita and Paiṭhinasi. The existence of the Mānava-Dharmasūtra has been rightly questioned. The word Manu has been used in different senses to imply different personalities. Hence, from the mere mention of the name Manu, by some ancient writers, it cannot be asserted that this Manu must be the author of the Mānava-dharmasūtra.

or borrowings[136] from the other extant Dharmasūtras; some of them hardly contain any legal[137] matter at all; and lastly there are some others which from the chronological point belong to a much later epoch.[138] Again, the mere quotation of one or two Sūtras of an author does not conclusively prove that that particular author had written a complete work. It might be that he never wrote more than one or two Sūtras or verses at all. Many texts have not been frequently quoted from Kānva, Jātukarṇa, Budha and Bharadvāja. Hence, it will not be very far from truth to say that they should not be credited with the authorship of complete works. It is not possible, nor is it necessary, to refer to all the Dharmasūtras in detail, in a work of legal history which essentially promises to be an outline in character, stressing only the important epochs. Though many topics were common in most of the Sūtra-writers, nevertheless, each contributed in his own way to the development of the Hindu legal system. From a perusal of the different legal topics and the modes in which they were treated in the Dharmasūtras, it can be clearly asserted that the Hindu jurists even of

Hārīta was, no doubt, quoted by ancient writers of the Dharmasūtras like Āpastamba, Baudhāyana and Vas'iṣṭha, but it is curious that many of these quotations are not traceable in the MS of Harīta, as discovered at Nāsika by Pandit Vamans'āstri Islampurkar. Moreover, there is a reference to Laghu Harīta and Bṛddha Hārīta. The work written in verse by Hārīta contains many elaborate rules of legal procedure and striking concepts of substantive law. That work quotes from Manu, Yājñavalkya, Nārada and Kātyāyana and as such it must be placed in a much later period.

No independent prose work of S'ankha Likhita has yet been discovered. Only two collections in verse have been printed by Jivananda and the Ānandās'rama collection. The prose quotations also are not to be found in the verse compilations.

Paiṭhinasi has not been included in the enumeration of Yajñavalkya as a writer on Dharma. He has been quoted only by some of the commentators.

136. The Dharmasūtra of Hiraṇyakes'in is an illustration of this type. It can hardly be called an independent work. Sūtras are borrowed word for word from the work of Āpastamba, (Vide Kane, History of Dharmas'astra, Vol. I, P. 46). This is true of Atri and Viṣṇu also.

137. Brihaspati, Atri, Bharadvāja, Vaikhānasa, Kas'yapa, or Kas'yapa, Gārgya, Cyavana and Jatukarṇa are comprised in this class. Brihaspati is mainly quoted as an author of politics. He must differ from Brihaspati the jurist.

Atri also does not otherwise deal with civil law excepting a verse which has been used as the authority of adoption by Nandapaṇḍita in his Dattakamīmāṃsā. The other writers, referred to above, deal with no legal topics at all. They deal with topics mainly connected with Prāyas'citta, impurities and prohibited food etc.

138. Viṣṇu, Devala, S'ātātapa, Budha, and Sumantu belong to this category.

From the elaborate discussion about Viṣṇu, by Kane, it is evident that he should be placed in the epoch covered by Manu and Yājñavaljya rather than in the epoch covered by the four oldest Dharmasūtras. (Vide Kane, History of Dharmas'āstra, Vol. I, pp, 64-65. For comparatively late dates of others of this category, see *Ibid*).

the earliest epoch developed a fairly tolerable legal system to be comparable favourably with any other known system of law as of Babylonia,[139] Egypt,[140] Rome[141] or Greece[142] which were generally archaic, fragmentary and rudimentary in character.

139. (See Ante, Chapter IV, 14).

Ancient Accadian laws, translated by A. H. Sayce, give us the laws of the Accadians who were one of the earliest tribes of Babylonia.

140. The Edict of Hamharb, translated by J. H. Breasted.

141. According to the provisions of the Twelve Tables of Rome also, there was retaliation, slavery, extreme form of *Patria Potestas* (even to kill sons) and the most cruel law of debt according to which a debtor could be killed and his flesh distributed among the different creditors, (Twelve Tables III, 6).

142. The Laws of Gortyns, discoverd in Crete and translated by H. J. Roby provide for the rules mainly for slavery. Of course, there are references to partition, adoption and suretyship.

CHAPTER V

The Arthaśāstra of Kauṭilya

1. Introduction

After the earliest Dharmasūtras, the work that deserves the greatest attention is the famous Arthaśāstra of Kauṭilya. After the epoch-making discovery of this work, various authors have expressed themselves from various standpoints regarding the time, authorship and the character of the work. The references on this subject are too numerous for enumeration. But there cannot be any doubt that Kauṭilya or Cāṇakya, the famous minister of Chandragupta Maurya, was the author of this book which must have been composed about 300 B. C. Kauṭilya had a wonderful personality and genius. He was believed to have been responsible for the over-throw and the destruction of the Nanda kings. Though the maker of an emperor and an empire, Cāṇakya had a calm and philosophic indifference towards wordly pleasure and plenty. This his philosophy could well-nigh be epitomised by the following couplet :

> *"Aśīmahi vayaṃ bhikṣām āśāvāso vasīmahi*
> *Śayī-mahi mahīpṛiṣṭhe kurvī mahi kimīśvaraiḥ"*

Regarding the nature of the work, it must be said that quite a new path was chalked out by him. His subject-matter was Arthaśāstra, Of course, Cāṇakya himself refers to many foregoing authors of Arthaśāstra : but no such work has ever come down to the present time. As it is, the Arthaśāstra of Kauṭilya must be contrasted with the foregoing Dharmasūtras. The Dharmasūtras (and also the Dharmaśāstras) were clearly works of Dharma, where the term Dharma was used in the most comprehensive sense to include the different branches of the sciences necessary for the regulations of human life from the standpoints of the different stages and the castes. But the Arthaśāstra dealt exclusively with the rights and duties of the king from the standpoint of actual administration involving the creation and regulation of the different departments of the Government including the most important organ of the state, *viz.*, the judiciary. Thus viewed, the Arthaśāstra is only a part of Dharmaśāstra. This is also corroborated by the view of Vijñāneśvara, (on Yājñavalkya II, 21) according to whom "Dharmaśāstrāntargatameva rājanīti laksṇārthaśāstra-midaṃ vivakṣitam." Hence the precise relation between the Dharmasūtras (also the Dharmaśāstras) on the one hand and the Arthaśāstra on the other is that the former briefly deals with more or less all aspects of the society and

also the state, whereas the latter fully deals exclusively with the functions and the organisations of the different organs of the state. For this consideration, law being one of the aspects of both social and administrative machinery has been treated by both the types of literature—the only distinction, however, in the treatment being that the Dharmasūtras did not systematically and exclusively deal with law, whereas the Arthaśāstra dealt with the political administration in general devoting exclusive chapters to the treatment of law. This exclusive and systematic treatment of law was a distinct achievement of the Arthaśāstra, as contrasted with the foregoing Dharmasūtras. This tendency was much accentuated even in the early Dharmaśāstras, such as of Manu and Yājñavalkya, awaiting culmination in the hands of Nārada and Brihaspati. If Manu and Yājñavalkya devoted separate chapters to Vyavahāra or law, in their works, Nārada and Brihaspati devoted their entire works to the treatment of law alone. Kauṭilya's Arthaśāstra had some marked characteristics: it was mainly secular and as such virtually divorced from all sorts of religious or sacerdotal elements. Of course, there are some occasional references to sacrifices, the other priestly duties of the Brahmins and the propitiation of Varuṇa in cases of crimes and transgression. Necessary comments have been made on passages of this nature in course of discussing the contents of the Arthaśāstra. The rules enunciated in the Arthaśāstra were based on the actual administration of the state and there was hardly any supernatural question at any stage or in any matter. In the Dharmasūtras, there was scarcely any discrimination of the treatment of the king, a priest, a judge or an ordinary man; but in the Arthaśāstra the parts to be played by the king and the judges were specifically and exclusively mentioned. In his Arthaśāstra, Kauṭilya devotes two chapters to law—one is known as the chapter on Dharmasthīya and the other is known as as the chapter on Kanṭakaśodhanam. The former is supposed to deal with civil law and the latter with criminal law. But this generalisation is not quite tenable in as much as in the chapter on Dharmasthīya, there are many topics which are really to be included in the chapter on criminal law and in the latter again, there are many topics which deal more or less with the administration rather than the judiciary and with the prevention of certain crimes rather than with the punishment or otherwise of crimes, when committed. There are, no doubt, certain topics dealing with criminal law in the chapter on Kanṭakaśodhanam. In style, however, the Arthaśāstra is more akin to the Dharmasūtras both being mainly written in prose. Some verses are to be found, of course, in both the types of works. It need not be supposed, however, that the origin of Hindu positive law (or Vyavahāra) must be

sought in the Arthaśāstra of Kauṭilya and its precursors. As a matter of fact, we do not know of any other works on Arthaśāstra except in name. Necessarily, the exact nature of their contents also is not known, if they existed at all. Above all, law has been treated in the Arthaśāstra of Kauṭilya not in an exclusive fashion; it has been treated there only as a fraction of the whole content. Hence, there is no sufficient warrant for Jayaswal's theory (Tagore Law Lectures, 1917, Manu and Yājñavalkya, Lecture 1) that the origin of civil law of later Hindu epochs must be sought in the Arthaśāstra rather than the Dharmasūtras. The truth seems to be that the Dharmasūtras were the earliest original treatises on Hindu Law and that the Arthaśāstra played its part only by having intervened the religio-socio-legal literature of the Dharmasūtras and the Dharmaśāstras. The observations of Kane also are instructive in this connection.[1]

2. Courts, contracts and trials

Book III and Book IV of Kauṭilya's Arthaśāstra deal with the administration of law. The former consists of twenty chapters and the latter comprises thirteen chapters. Kauṭilya prefaces chapter I of Book III with a description of the location and the[1a] constitution[2] of the courts. The first topic of civil law dealt with by him is the formation of contracts or agreements, the different parties thereto, the grounds of invalidity,[3] punishment for fraud[4] and the principle of agency in contract.[5] The latter parts of Chapter I[6] deals with trials, the different parties with details sufficient for their indentification, the plaint, the written statement,[7] the offence of Parokta,[8]

1. History of Dharmaśastra, Vol. I, pp. 98-99.

1a. Justice must be administered in the cities of Saṃgrahaṇas, Droṇamukha, Sthīya and at places where different districts meet.

2. Three members versed in the sacred law and three ministers of the king were to form the court. There was, however, no discrimination of castes as in the Dharmasūtras.

3. Generally, contracts entered into in seclusion, inside a house, in the dead of night, in secret and with fraud were invalid. But exceptions were recognised in certain cases in special consideration of the peculiarity of the circumstances.

4. No agreement was to be declared void against a spy even if it was entered into with fraud. Espionage was a part of politics generally, but it was applied in private law as well.

5. The principle of agency in contract was recognised subject to certain conditions and limitations.

6. Chapters have been differentiated on the basis of the different topics of law.

7. The plaint and the written statement had to be recorded and were treated as highly important in deciding disputes. The parties would be pinned down by their first statement of the case.

8. The offence of Parokta which was punishable could be committed in several ways by different acts of the parties beginning from the institution of the suit up to its completion.

payment for witnesses,[9] prohibition of counter-suits,[10] adjournments[11] and the different means or sources[12] of administration of justice even with the help of spies.[13]

3. Marriage, duties of husband and wife, strīdhana and elopement

Chapters II to IV of the Arthaśāstra (Book III) deal with marriage, its different kinds, strīdhana, compensation on the husband's remarrying for the second time, the duty of a wife, her maintenance, cruelty to her,[14] enmity between husband and wife, the latter's transgression and favour shown to others, her vagrancy and elopement and the husband's sojournments of different duration. Kauṭilya says that marriage is at the root of all disputes. What he really means by this is perhaps that all disputes regarding personal law of property are ultimately due to the institution of marriage. He also refers to the eight forms of marriage with the usual distinctions of the approved and the disapproved forms of marriage. But it appears that this distinction is based on the old customs, whereas Cāṇakya himself countenances the view that every form of marriage is approvable provided it pleases all concerned with the marriage. Obviously, he is using the word in its

9. The defeated party was to bear the cost of the witnesses of the successful party

10. Except in cases of some crimes and disputes concerning merchants, there could not be any counter-suit.

11. Adjournments could be given to defendents for submitting written statements. But no adjournment was to be allowed for a plaintiff giving reply to written statement. The reasons given are that the plaintiff knows his case from before; but this may not be the case with the defendent specially when the case is fasle or only partially true.

12. The four sources or aspects of law have been contained in a verse. Towards the end of every chapter in the Arthas'āstra, there are some verses which in their composition and content betray close points of similarity with the rules made and the verses quoted by the earlier writers of the Dharmasūtras. But nowhere Cāṇakya mentions any one of them by name. In the first verse in Chapter I, Cāṇakya describes the king as the fountain of justice (Dharma Pravartaka) and as such responsible for the maintenance of order and religion among the different castes and the As'ramas which are the main props of the Dharma-jurisprudence. For the discussion of the different meanings of the sources of law, as enumerated by Kauṭilya, (see Ante, Chapter IV). Though the royal edicts have been enumerated as one of the sources of law, still there was hardly any legislative enactment in these edicts which were mostly administrative or judicial in character. The king also was the highest judicial tribunal. But nowhere even in the Smṛitis has the king been entrusted with legislative functions.

13. The utilisation of the services of the king's spies in the administration of justice is altogether a new contribution by Kauṭilya whose elaborate system of espionage in political administration attained its highest perfection even at a quite early stage of human history.

14. A wife could be subject to reasonable chastisement and corporal punishment.

non-technical sense. A wowan also has been recognised by Cāṇakya as having absolute right in certain properties. As a matter of fact, throughout these chapters, Kauṭilya recognises an equal status between a man and a woman. The principles that women can never deserve independence and that a woman can never be the owner of any property were not recognised by him. The reaction according to him seems to be always strictly reciprocal where both the parties are equally treated to be of flesh and blood and subject to identical rules of logic and economy. Thus if a husband can marry for the second time, so can also a woman ; if a wife can be discarded by her husband, a husband also can be abandoned by his wife, if he is either of bad character or is long gone abroad or has become a a traitor to the king or is likely to endanger the life of his wife or has fallen from his caste or has lost his virility; a husband can take any number of wives provided he makes suitable compensation for his former wives, as women were supposed to be meant for sons. But nowhere Cāṇakya advocates the religious theory of marriage. Widows also were allowed to re-marry. A woman who hates her husband and loves another man shall immediately return to her husband all the endowments and jewelleries received from him and allow him to take another wife. Similarly the husband also hating his wife should allow his wife to take shelter in the house of a mendicant woman or of lawful guardians and kinsmen. No marriage-tie could be dissolved without mutual consent, though mutual enmity also could dissolve it.

4. Partition and inheritence

Chapter V, VI and VII of Kauṭilya's Arthaśāstra (Book III) deal with partition, its time, special shares,[15] different shares and discrimination[16] between the different kinds of sons regarding their status and right of inheritance[17]. Partition must be based on local customs and the customs of the different castes and guilds. Self-acquired property or gains of learning were not liable to be partitioned. Partition is to take place when all the heirs have attained majority. No such rule was enunciated by any of the Sūtra-writers. Generally speaking, partition among the heirs is not permissible during the life time of the parents; if the father is alive at the time of the distribution of the property, he shall not make any discrimination between

15. This was allowed by the followers of Ūs'anas but was not approved by Kauṭilya.

16. The shares differed according to the difference in the caste of the mother of the sons born of Anuloma and Pratiloma marriage.

17. Reference was made by Cāṇakya to the controversy regarding the ownership of a Kṣetraja son. According to him such a son belonged to both the fathers.

the differant sons. Nor shall any son be disinherited without sufficient reason. Again if partition takes place during the minority of any heir, the minor shall have his share free from the liability for the debts. In case of unjust and inequitable partition, based on fraud—*suppressio veri* or *suggestio falsi*, the partition shall be re-opened. The king was the ultimate heir, on failure of other heirs, except in the case of properties of a Brahmin[18]. In the next place, Cāṇakya enumerates the rules for the construction of "Vāstu"[19], its sale,[20] boundary disputes, methods of determining these disputes, the different kinds of obstacles to the enjoyment of different kinds of properties[21] including destrution of pasture lands, fields and roads and the non-performance of the different kinds of agreements. The "Vāstu" has been used in a wider sense by Kauṭilya to include houses, fields, gardens, buildings of any kind, lakes and tanks. There were also various detailed rules regarding the construction of houses, the violation whereof was punished with fines. In this connection Cāṇakya used a large number of technical terms. A veıy peculiar procedure was laid down by Cāṇakya for the sale of 'Vāstu': forty members of the neighbourhood belonging to good families were to assemble near the 'Vāstu' for sale and announce it as such. This procedure served as a guarantee against sale without ownership and other malafides in the intended transaction. Kinsmen, neighbours and rich persons were to bid for the purchase in succession. The disputes regarding the 'vāstu' in general and the boundaries in particular were to be decided according to the opinions of the elderly neighbours who could speak from experience and existence of some natural and artificial boundary marks. Similar provision was found in Vaśiṣṭha and some other Sūtra-writers also. When new lakes or tanks were constructed, the taxes for the lands covered by them were to be remitted for five years; in case of repair of similar works, the taxes were to be remitted for four years and for improving, extending or restoring water-works overgrown with weeds, taxes were to be remitted for two years. There were also detailed rules for settling in a village; thus the tax-payers were to sell or mortgage their fields to the tax-payers only and no tax-payer was to settle in a village not inhabited by tax-payers. The violations of these rules were to be punished with fines. A village headman driving out a man except a thief or an adulterer shall be liable to be fined. Persons responsible

18. Similar views were held by the Sūtra-writers also most clearly and emphatically.

19. Kauṭilya's Arthas'āstra, Chapter VIII.

20. *Ibid*, Chapter IX.

21. Such as pasture land, plains, fields, flower gardens, a thrashing floor, houses and stables for horses.

for obstructing or doing mischief to any flow of water or road etc. were to be punished with the first amercement or fines varying from twelve to one thousand 'paṇas' according to the circumstances of the case. There was also provision for maintaining pasture lands, plains and forests for the grazing of cattle[22]. Any cultivator or priest agreeing to do some work and receiving remuneration therefor was to refund double the amount in case of breach of agreement. The fine thus levied was to go to the village[23].

5. Debts and deposits

In Chapter XI (Book III), Kauṭilya deals with recovery of debts and the character of witnesses to prove those debts. All transactions between creditors and debtors were subject to severe scrutiny by the state as the very welfare of the realm depended on these transactions,[24] greatly responsible for the prosperity of the country, on account of encouragement of trade and commerce. The usual rate of interest was a 'Paṇa' and a quarter *per cent* per month, *i.e.*, 15% *per annum*, a rate of interest which was wrongly attributed to Vaśiṣṭha by Manu.[25] The principle of Damdupat also was recognised by Cāṇakya.[26] No interest could accrue to debts due by students, minors, too poor persons or persons engaged in performing sacrifices for a long time. A creditor refusing to receive the re-payment of his debt was to be fined. Unless a debtor was long abroad, he could not be legally sued simultaneously for more than one debt by one or more creditors.[27] No transaction of debt could be proved by one witness[28]; it has to be proved by three or at least two honest, respectable and reliable witnesses.[29] This shows the importance of debt and the scrutiny to which it was usually subjected. Relations and interested persons could not be witnesses in transactions of contracting debts. Witnesses were to depose

22. Kauṭilya's Arthas'āstra, Chapter X.

23. *Ibid.*

24. Higher rates of interest could be charged from the ordinary traders and the sea-traders.

25. This rate of interest was enunciated for the first time by Gautama. See Ante, Chapter IV, 7.

26. A creditor suing for four times the debt was to be fined four times the unjust amount.

27. Loans were encouraged perhaps for the spread of trade and commerce benefitting the kingdom at large ; hence, this leniency.

28. In Nārada's Smriti also, the topic concerning witnesses has been discussed in connection with the subject of debt.

29. On many points, Cāṇakya claims to be the original propounder of new theories and principles which were virtually accepted and elaborated by Manu, Yājñavalkya, Nārada and Brihaspati. In later periods, these principles were respected not as having originated with Cāṇakya but as treated by the Smriti writers.

before Brahmins, fire and vessels of water. There was no ordeal; but there were oaths. The persons of different castes were to take the oath in different ways. In all these respects, the Arthaśāstra of Kauṭilya presents some close points of similarity with the earliest of Dharmaśāstras. In case of difference in the evidence of different witnesses, judgment might be given according to the majority of the reliable and respectable witnesses.[30] Kauṭilya also differs from the followers of Uśanas, Manu and Brihaspati regarding the punishment to be inflicted on an untruthful witness.[31] The laws of Cāṇakya[32] regarding deposit, sealed or unsealed, pledge, property being entrusted to another for delivery to a third person, borrowed or hired property and sales by agents are more or less analogous. In each of these cases, when the property concerned is lost or destroyed without any fraud or negligence of the persons to whom they were entrusted, the persons entrusted will not be held responsible for the loss or destruction. Almost similar provision was made by Gautama also who was supposed to be the earliest of the Dharma-Sūtra writers. The pledgee who does not reconvey the property, when the debtor is ready to repay the loan, shall be liable to be fined. In absence of the creditor, the debtor is entitled to deposit the amount of the loan with the village elders and get back the property pledged. If the pledgee used the pledged property without the permission of the borrower, he will be accountable for the net profit arising from that use and be liable to forfeit the loan itself. Again, if through a merchant, a messenger is entrusted with an article to deliver the same to a third party and if he is robbed of it on the way, neither the merchant nor any kinsman of the messenger will be liable.

6. Slaves, labourers and co-operative undertakings

In dealing with rules regarding slaves and labourers,[33] Kauṭilya makes a general provision that never shall an Ārya be subjected to slavery. A man who is not a born slave and who has not attained majority, when sold or mortgaged by his kinsmen, will make them liable to be punished with fine varying from 12 to 48 paṇas according to his caste. It was not a crime on the part of the Mlecchas to sell or mortgage their own offspring. There could, of course, be civil bondage, when the kinsmen could mortgage

30. This principle was elaborated by Manu and Yājñavalkya on the one hand and Nārada and Brihaspati on the other.

31. Kauṭilya's Arthas'āstra, Chapter XI. As regards the production of witnesses Kauṭilya says that the parties should produce their own witnesses; but in cases where the parties are unable to do so, the courts shall compel the witnesses to appear.

32. Arthas'āstra, Chapter XII.

33. Ibid, Chapter XIII.

an Ārya in order to tide over family troubles, to find money for fines or court decrees or to recover the confiscated household implements; but in that case also they should be redeemed by the kinsmen as soon as possible. There are also references to show that there could be voluntary enslavement.[34] Slaves also could be emancipated on paying ransom or otherwise. The ransom necessary for a slave to regain his freedom was equal to the price for which he was sold. A slave could also become free, if he or she was ill-treated. A human and legal status was recognised for the slaves. A slave was entitled to his own earning without prejudice to his master's interest and his properties inherited from his ancestors. If a man would not set his slave at liberty even on payment of the ransom, he was to be punished with 12 paṇas. Again, when a child was begotten on a female slave by her master, both the slave and the child would become free. All disputes between master and servants, shall be decided by the neighbours. An afflicted man in order to get rid of the affliction or the distress might promise to give his rescuer all his properties including even his wife and children; but in that case, he shall have to pay only a reasonable amount of remuneration, as determined by experts on account of such meritorious service. A servant neglecting or unreasonably putting off work and a master unreasonably refusing to accept work from his servant shall be fined 12 paṇas.[35] Kauṭilya refers to the views of his preceptor that where the master refuses to accept work from his servant who is ready to work, the work should be treated as completed[36]. More or less the same rules of conduct between master and servant apply in case of guilds[37] and co-operative undertakings including performances of sacrifices. Priests working in co-operation in a sacrifice are to divide the earnings either equally or according to the agreement made among themselves.

7. Rescission of contracts and resumption of gifts

Kauṭilya enumerates[38] the conditions under which contracts for purchase and sale and marriage contracts could be rescinded and the different rights and duties of the different parties concerned. The marriage contracts could be rescinded whenever there was any *suppressio veri*;

34. Thus a man who has once enslaved himself shall, if he runs away, be a slave for his whole life. The offspring of a man who had sold himself as a slave was to become an Ārya.

35. Arthas'āstra, Chapter XIV.

36. Kauṭilya himself does not subscribe to this view.

37. To fulfil their agreements, guilds of workmen could be allowed a grace of seven days more over and above the stipulated period.

38. Arthas'āstra, Chapter XV.

regarding any material factor. But no rescission could be allowed when the parties were free from blemishes and belonged to high families. Again, marriage contracts among the higher castes could be rescinded only before the rite of Pāṇigrahaṇa, whereas among the Śūdras, before the consummation of the marrage. Suppression of any defect on the part of the wife would make the giver in marriage liable to be fined with 96 paṇas and the forfeiture of the Śulka. Again, receiving a girl in marriage without declaring the fault of the bridegroom would expose the man to double fine and the forfeiture of the Śulka. In the case of a merchant refusing to make over the article sold, the fine imposed on the merchant would be 12 paṇas. There was also specific provision for time during which the contracts could be rescinded according to the different occupation[39] of the parties concerned. The rescission of contracts was to be decided by an assembly, convened for the purpose, so that none of the parties might be put to any unreasonable loss or injury.[40] In Chapter XVI, Kauṭilya deals with resumption of gifts, sale without ownership and loss of ownership by adverse possession. Resumption of gifts is to be regulated by the same rules as concerning the recovery of debts.[41] All cases of resumption of gifts, like rescission of contracts, were to be adjudged by an assembly convened for this purpose. Thus gift of everything including one's own life, wife and children, gifts or charitable subscriptions to the wicked or for unworthy purposes, gifts of monetary help to the cruel or for malevolent persons, would naturally give rise to suspicion and as such were liable to be resumed. Similarly any gift received from timid persons with threats of legal action, defamation or loss of property would make the receiver of gift liable for theft.[42] No heir also could be compelled to pay the value of bail, the balance of Śulka or the gifts promised by a man under the influence of wrath or liquor. In case any lost article was detected with any man, the owner could either get that man arrested through court or take him to the court through selfhelp. If the man in possession of the article could give a reasonable explanation as to the circumstances under which he came by it, he might be let off after giving the property to the real owner. In case where no satisfactory

39. One night for merchants, three nights for cultivators, five nights for herdsmen and seven nights for dealers in precious articles.

40. The assembly was to take into consideration all the facts and circumstances of the case to come to the correct decision.

41. Imperfect or invalid gifts could not clothe the receivers with any legal right or title and hence, such gifts were like debts to be realised from them.

42. All these are the different kinds of void or invalid gifts liable to be resumed according to the decision of the assembly of rescissors.

explanation was forthcoming, the man would be punished for theft of the article. Similarly it was the duty of the king to recover articles even from the enemy's country and forest and make them over to the real owners. Any property robbed or stolen which could not be recovered by the king or his officers had to be made good from the king's treasury.[43] An adventurer was allowed to enjoy with the king's permission any property gained by him from the enemy's country excepting the life of an Ārya or the property of an ascetic, Brahmin or Gods[44]. A mere temporary absence or dispossession could not be sufficient for the loss of title or owner-ship. Adverse possession for ten years could involve the loss of title except in cases of minors, the aged, the diseased, those who had been sojourning abroad or those who had been compelled to desert their countries during natural disturbances. A building, however, could be lost by enjoyment by others for more than 10 years. But mere occupation of the buildings by kinsmen, priests and heretics shall not give them the right of possession.[45]

8. Crimes

The last four chapters in Kauṭilya's Arthaśāstra, Book III, deal with crimes, such as, robbery, defamation, assault and gambling and betting along with other miscellaneous offences—which are clearly topics of substantive criminal law. There is no justification for the supposition that Book III deals with civil law alone and that Book IV deals with criminal law exclusively. The classification of civil and criminal laws has not been strictly followed in the allotment or distribution of the topics in Book III and Book IV. It is also noteworthy that most of the topics dealt with in Book IV, concern prevention of offences rather than the substantive character of criminal offences.[46] Robbery or Sāhasa has been defined by Kauṭilya as sudden and direct seizure of person or property and as such it has got to be contrasted with

43. Similar provision was found in Gautama also (X, 46-47).

44. This is an illustration of recognising some preference for the Brahmins, though such references are few and far between. Otherwise the whole work of Kauṭilya is based on secular principles. In cases where hermits, ascetics and Brahmacārins were to pay fines for having committed any offence, they might instead perform penances, offer oblation to Gods or Fire or perform some other religious rites in the name of the king according to the number of paṇas of fine. Cāṇakya at the same time made provision for the heretics as well who were to pay fines in cases of offences. But those heretics who had no gold or gold coins were to observe penances except for the offences of defamation, theft, assault and abduction of woman. These offences were to be invariably punished. The king on pain of fines was to forbid any wilful or improper proceedings against an ascetic.

45. Similar rules shall govern open deposits, pledges, treasure-trove, boundary or any property belonging to the king or S'rotriya. (Kauṭilya's Arthas'āstra, Chapter XVI).

46. This point will be further elaborated while explaining the term Kaṇṭaksa S'odhanam.

theft which implies only fraudulant or indirect seizure. Kauṭilya[47] again conceives a truly criminal element in robbery when he says that the fine or or punishment shall be proportional to the gravity of the offence rather than to the value of the articles involved. In this connection, Kauṭilya refers to and controverts the theories advocated by the schools of Manu and Uśanas. He also describes the different kinds of fines—first amercement, middlemost amercement and the highest amercement. For abetment of robbery, an abettor has to be fined twice or four times according as he causes another man to commit the robbery or employs a hire-ling for that purpose. Within defamation, however, Kauṭilya includes calumny, contemptuous talk and intimidation. If a man, capable of doing harm to another, out of enmity, intimidates him, he shall be compelled to furnish life-long security vouchsafing safety to the person intimidated. Defamation of one's own nation or village was to be punished with the first amercement, that of one's caste or guild with the middlemost and that of Gods and temples with the highest amercement[48]. The abusive character of the expression had to be judged by the spirit rather than by the form of the expression, true or false. Fines also were to be imposed according to the caste[49] and rank[50] of the person defamed. The crime of assault is committed by touching, striking and hurting. Rank plays an important part in determining the nature of and punishment for assault as in the case of defamation. It is quite easy to understand why status or rank should play an important part in defamation, but it is not so easy to follow why rank or status should at all be considered in cases of assault unless some invidious distinction is made between one man and another regarding their life and body. It can be clearly appreciated, on the other hand, why assault on other's woman was more heavily punished.[51] A Śudra striking a Brahmin had to get his hand out off. Dr. Sham Shastri is of opinion that this portion is an interpolation. But this is not the solitary instance where some consideration is known to the caste system. On the whole, of course, the Arthaśāstra is more rational and secular than the

47. Arthaśāstra, Chapter XVII.

48. Ibid, Chapter XVIII.

49. Caste system played an important part in Kauṭilya's work also as it did in the Dharmasūtras and the Dharmaśāstras. Punishment also was to vary according to the caste of the offender and the offended. This was true not only of criminal law but also of civil law.

50. Rank or status was rightly regarded as a very important factor in determining the defamatory character of expressions and acts and the punishments therefor. This is also true of the modern principles of defamation. Rates of fines also were to vary according to the rank of the parties and the gravity of the offences. (Chapter XX).

51. See Kauṭilya's Arthaśāstra, Chapter XIX.

Dharmasūtras and the Dharmaśāstras, but the actual status of the Brahmins in the society could not be entirely ignored by Cāṇakya. Hurts were distinguished as those causing bloodshed and as those not causing bloodshed. Beating a man, however, almost to death without causing bloodshed, breaking the hands, the leg etc. was to be punished with the first amercement. Each one of a confederacy inflicting hurt on a person was to be punished with double the usual fine. Kauṭilya again refers to two other important topics : according to his predecessors, quarrels and assaults of remote dates could not be legally complained of. But Kauṭilya says that no offence could be affected by limitation or passage of time. Again, according to the predecessors of Kauṭilya, the first to complain is to win, in as much as, pain drives one to law without delay. Kauṭilya does not agree with the above view; on the contrary, he enunciates a very sound theory that each complaint must be judged by the proper consideration of the evidence available. Fines were to be imposed even for doing mischief to plants and trees. Double fines were to be levied, when any injury was done to any tree on the boundry, in places of pilgrimage or the forest of the king. Gambling and betting could be indulged in according to Cāṇakya only under the supervision of the Superintendent in charge of gambling. But he was careful enough to sanction gambling under state supervision with the remote objects of detecting thieves, spies and stolen properties. There was also an immediate gain in the shape of revenue to be realised from the gamblers. Other miscellaneous types of offences also were described by Cāṇakya, such as criminal misappropriation, criminal breach of trust, the touching of an Ārya woman by a Caṇḍāla and entertainments of Buddhists, Ājīvakas and Śūdras on occasions of worships or Śrādhs. Not to run to one's help also was an offence.[52]

9. Kaṇṭaka Śodhanam

In book IV of his Arthaśāstra, Kauṭilya deals with Kanṭaka Śodhanam[53]—which is wrongly supposed to deal with criminal law exclusively. The word 'kanṭaka' means artisans according to the Tāmil and Mālayalām commentaries. There is hardly any discussion of substantive crimininal law proper, in Book IV. Whatever little criminal law has been dealt with herein, is merely concerned with police functions or

52. Herein the distinction between moral duty and legal duty seems to have been obliterated. This is an instance of over-legalisation (as to be found in Manu and Yājñavalkya also) except in case of calamities or disturbances when special ordinance might be passed as emergency measures.

53. Three Commissioners or Ministers shall deal with measures to suppress disturbances to peace. They will act more as administrative than as judicial officers.

preventive measures along with some means employed for detecting crimes and some methods of punishment. Almost all the usual topics of substantive criminal law had already been discussed in the last four chapters of Book III. An examination of the contents of Book IV will at once show the truth of the above observations. The use of the word 'Kaṇṭaka' is very significant. The different Kaṇṭakas (throns) are the potential sources of certain illegal and criminal acts, which if not checked or prevented, will surely stand in the way of the smooth working and the administration of the society as a whole. The last verse at the end of Chapter I of Book IV, will explain the real character of the different kaṇṭakas or sources of mischiefs to the society. The traders, artisans, musicians, beggars, buffoons and other idlers[54] are thieves in effect though not in name and as such they must be restrained from perpetrating oppression on the society. There is hardly anything of criminal law in Chapter I except that for selling, mortgaging or letting out for hire the clothes of others, washermen shall be fined 12 paṇas and that physicians shall be guilty of negligence and carelessness when the patients die or the disease aggravates by their mistake or ignorance. To prevent the merchants from practising deception, the weights and measures shall be examined and scrutinised.[55] This is also more preventive than punitive or otherwise. In Chapter III, there is a discussion about the different kinds of national calamities only rather than any topic of law except that in cases where people are being carried away by floods, persons neglecting rescue[56] with the exception of those who have no boats, shall be fined 12 paṇas. These measures also are more administrative[57] than judicial. The national calamities might appear in the shape of fire, floods, pestilences, famines,[58] rats, snakes, tigers, and demons—to disturb the peace and tranquility of the society. Chapters IV to VI deal with suppression of the wicked, living by foul means, detection of youths of criminal tendency by ascetic spies and the arrest of criminals on suspicion or in the very act of committing the crime. These are the different duties which have been ascribed by

54. The list of artisans is simply enumerative rather than exhaustive. Taking advantage of their occupations, the artisans could not be allowed to practise fraud or any other offence.

55. Kauṭilya's Arthas'āstra, Book IV, Chapter II.

56. In this case the duty can be hardly regarded as legal unless special ordinances are passed on account of the prevalence of the calamities.

57. Special administrative measures have got to be promulgated in times of natural or national calamities so that lawlessness might be effectively checked.

58. In times of famine, additional revenue could be exacted from the rich for administrative purposes ; there was nothing judicial in it.

Kauṭilya to the Collector-General or the Pradeṣṭā who is an administrative officer without any judicial function[59] at all. In the verse at the end of Chapter IV, Kauṭilya refers to 13 kinds of criminals who secretly[60] attempt to live by foul means and thereby destroy the peace of the country. These disturbing elements shall be either banished or compelled to pay adequate security or compensation. The Collector-General shall employ spies, in the guise of ascetics, bards, astrologers, prophets etc. who by various traps shall find out the different culprits, such as false witnesses, manufacturers of counterfeit coins etc. According to the verse at the end of Chapter V, the Collector-General shall exihibit in public, the arrested criminals and thus proclaim the omniscience of the king and the never-failing vigilance of the king's officers among the people. The Commissioner also with his retinue[61] of Gopas and Sthānikas shall take adequate measures for arresting external as well as internal thieves.

Chapter VII deals with the examination of sudden or unnatural death. Kauṭilya gives several hints for ascertaining the real cause of death or murder, but this chapter does not contain any element of law—civil or criminal. On the contrary, towards the end of the chapter, Cāṇakya refers to certain verses according to which directions have been given for the disposal of the dead body and the religious rites that have to be performed on occasions like these. No crematorial rites or obsequies by relations could be performed in cases of murders or suicides. Chapter VIII deals with the different methods of trial and torture for eliciting confession. Torture could be resorted to only when there were strong and sufficient grounds of suspicion and reasonable belief that the suspected person has actually committed the crime in question. Persons charging innocent men with theft or any other crime shall be punished as having committed the same offence. Women were to be subjected to half or no torture at all. In their cases, cross-examination could be resorted to, as a weapon for discovering[62] the truth. There could not be any torture for the Brahmins

59. To get rid of snakes and demons, Kauṭilya also provides for the performance of certain rites according to the Atharva Veda. This is also corroborated by the verse at the end of Chapter III of Book IV

60. The detection of secret criminals would undoubtedly inspire confidence in the people.

61. All these are administrative or police officers who are concerned only with the detection and arrest of criminals rather than with their punishments.

62. This also refers to the pre-judicial stage of enquiry rather than any actual stage of judicial administration.

also.[63] Chapter IX deals with the penal measures which could protect people from being oppressed at the hands of the public servants under the colour of their authority and office, appertaining to the different departments of the administration. As a matter of fact, very stringent rules were provided for, for the punishment of the government servants who on account of their very office, were subjected to additional liability to be more careful and considerate in dealing with the people at large. The reasons for this high standard of honesty and integrity on the part of the government servants have been very lucidly given in the verse at the end of the chapter. Thus the royal officers and their subordinates should be tested first ; as it is through them that the criminals were to be punished. If they were themselves dishonest, no true and honest work could be expected of them for the benefit of the public. Chapter X[64] provides for alternative fines in lieu of mutilation of limbs. When specially the governmnt servants were guilty of offences, such as, violation of sacred institutions or pick-pocketing, for the fourth time, they were to be put to death. Up to the commission of the offences for the third time, fines could be paid instead of mutilation of limbs. For the offences of theft of various articles, adultery and abetment of these offences, the hands, feet, nose or ears could be cut off according to the gravity of the offence. But a person committing theft regarding images of Gods, men, gold coins, precious stones, etc. was to be beheaded or to pay the highest amercement. Any person selling human flesh was to be condemned to death. In the concluding verse[65] at the end of the chapter, Cāṇakya makes a very comprehensive provision for inflicting different kinds of punishments, taking into consideration all the relevant facts and circumstances of the case, including the social status, the antecedents, the family, the occasion and the time and place of the offence.

Chapter XI deals with certain offences which must be punished with death with or without torture. In the concluding verse of this chapter, Kauṭilya refers to the views of the sages who have provided for capital punishment; but at the same time, it has been added that no torture should be resorted to when there was no cruelty involved in the offence

63. Whatever the nature of the crime, a Brahmin could not be tortured. He was to be sent to the mines or banished by the king after his face has been branded so as to have a mark indicating his crime.

64. This chapter deals with some topics of criminal law including theft, adultery and other offences with their corresponding punishments.

65. This verse virtually summarises the conditions necessary for appropriate punishment for the offences. (Chapter X).

in question.[66] Simple death will be sufficient for offences without any cruelty. The different methods of inflicting capital punishments were by hanging,[67] by burning,[68] by drowning,[69] by shooting[70] and by tearing with the help of bulls.[71] Sometimes mutilation of limbs[72] and the punishment of the highest amercement could be imposed according to the gravity of the offences. Different methods of capital punishments were provided for, for different kinds of murder. Chapter XII deals with sexual offences in general and such offences against immature girls[73] in particular. The crimes concerning sexual offences ought to have been discussed along with the other usual types of crimes, such as, robbery, assault etc. and as a matter of fact, no reason can be assigned why this topic was not treated in Book III. The general provisions of Chapter XII are that no man shall have sexual intercourse with a woman against her will, that women also yielding themselves for the offence are to be punished and lastly that all abettors in such offences are to be punished equally with the principal offenders. There were also, at the same time, some special provisions in cases where a man of the same caste could be criminally intimate with a maiden who remained unmarried for three years after the attainment of her puberty.[74] It was not an offence even in case of a man of different caste, when the maiden had no jewellery on her person. Again, a man rescuing a woman from enemy, forest, floods, etc. could enjoy her with her consent, if agreed upon.[75] The last chapter of Book IV deals with different kinds of punishment for violating justice. The term justice has been used

66. When one man kills another man in a quarrel, he shall be put to instantaneous death.

67. This was the punishment for a man who caused violent death to another man or woman.

68. An offence against the king and his kingdom was to be punished by burning from head to feet. A Brahmin also was thus to be drowned for such offences; he could not avoid capital punishment in case of offences against the king.

69. Drowning was the punishment for poisoning and murder committed by woman.

70. Any man other than a soldier stealing armours and weapons was to be punished with shooting.

71. A woman murdering her husband was to be torn off by the bulls.

72. A sort of Lex talionis also was provided for when a man's tongue or hands were out off for abusing his father or any other superior or causing injury to another's nose or ears.

73. If a man defiles a girl before her maturity, his hands shall be cut off and he shall be fined four hundred paṇas.

74. This provision of law seems to be based on the principles of early marriage which was encouraged in all conceivable ways.

75. This is also corroborated by one of the verses at the end of the chapter.

in a comprehensive sense including 'Varṇa-Dharma,'[76] trespass, nuisance,[77] assault, witchcraft, compensations to be paid to the merchants by the king's officers or villagers[78] in cases where any merchandise is stolen from the merchants in course of their journeys, the injuries resulting from different kinds of tamed animals and lastly some sort of penances to be performed by the king to get rid of the sin resulting from the unjust imposition of punishment, specially on the innocent. According to this provision, the king is to dedicate some money to the God Varuṇa[79] by throwing the same into the water.

10. Special responsibility of the king and "the rule of law"

It has already been seen that if a theft could not be detected or the stolen property could not be recovered, the king was to compensate the aggrieved person out of his treasury ;[80] sometimes the villagers and sometimes the officers concerned were to make good the loss. This was the rule enjoined not only by Kauṭilya but also more or less by other writers of the Dharmasūtras and the Dharmaśāstras. Thus Gautama[81] provides that if the stolen property is not recovered, the king shall compensate the loss from the treasury. Manu also says that the king must restore the stolen property when recovered and must compensate when not recovered. According to Yājñavalkya,[82] also in cases where theft cannot be detected or the stolen property cannot be traced, the king's officers and the villagers concerned are to blame and the latter are to compensate for the unrecovered stolen property. Almost similar is the provision made by Nārada[83] also according to whom wherever the foot-prints of the thief go, the inhabitants or the owners of that place must make good the loss unless they can satisfy that the foot-marks got out of that place again. These provisions indicate that theft was not of frequent occurrence, as in that case, it would not have been possible for the king to compensate so many injured persons. Thefts were few and far between during the time of Kauṭilya and for a consider-

76. To cause any one of the different castes to partake prohibited food was regarded as an offence punishable with fine.

77. Any bodily harm resulting from the nuisances was to be regarded as crime of assault.

78. The villagers were held liable to compensate for the loss of the merchants. This could be conceived only when the administration was efficient and even the ordinary run of men was strictly honest.

79 Varuṇa played a very important part in the development of crimes and punishments in Hindu Law. (See Ante, Chapters II and IV).

80. Arthas'āstra, Chapter XVI.

81. X, 46-47.

82. II, 272.

83. XIV, 12-17, 27.

able period after him. This will be corroborated also by Megasthenes who gives us an account of the conditions of the people. Thus he says: "Theft is of very rare occurrence. The simplicity of their laws and their contracts is proved by the fact that they seldom go to law. They have no suits about pledges or deposits; nor do they require either seals or witnesses, but make their deposits and confide in each other. Their houses and property they generally leave unguarded. These things indicate that they possess good, sober sense". Hiuen Tsiang[84] also made similar observations: "With respect to the ordinary people, although they are naturally light-minded, they are upright and honourable. In money matters they are without craft and in administering justice they are considerate. They dread the retribution of another state of existence and make light of things of this world. They are not deceitful or treacherous in their conduct and are faithful to their oaths and promises. In their rules of government there is remarkable rectitude, while in their behaviour there is much gentleness and sweetness."

Kauṭilya also made elaborate provision regarding the conduct and character of the judges[85] so that they might readily inspire the confidence of the litigants. Thus if a judge ever browbeats or unjustly drives out or silences any of the litigants in his court, he shall first of all be punished with the first amercement. If he defames or abuses any one of them, the punishment shall be doubled. Again if the judge does not ask what ought to be asked or leaves out what he himself has asked, teaches or reminds, he will be punished with the middle-most amercement. If a judge does not enquire into necessary circumstances, enquires into unnecessary circumstances, makes unnecassary delay in discharging his duty, postpones work with spite, causes parties to leave the court by tiring them with delay, evades or causes to evade statements that lead to the settlement of a case, helps witnesses, giving them clues, or resumes cases already settled or decided, he shall be punished with the highest amercement. If he repeats the offence, he shall both be punished with double the above fine and dismissed. When a judge or a commissioner imposes an unjust fine in gold, he shall be fined either double the amount of the fine or eight times that amount of imposition which is either more or less than the prescribed limit; again, if a judge or a commissioner imposes an unjust corporal punishment, he shall himself be either condemned to the same punishment or made to pay twice the amount of ransom leviable for that kind of injustice. Lastly, when a judge falsifies whatever is a true amount or declares as true whatever amount is false, he shall be fined eight times that amount.

84. This great Chinese monk visited India and extensively travelled in the 7th century A. D.

85. Arthas'āstra, 224, 225.

As regards the recognition and application of the rule of law, it was quite clear that no body was held above the law. The king himself, not to speak of the other members of his family, was equally subject to the law of the realm, along with the ordinary subjects. According to the story of king Bimbisara, as recorded by Hiuen Tsiang, it is said that in order to prevent fire which became rather frequent at that time, the king passed a law that anybody in whose house fire broke out would be banished. One day, fire broke out in the capital itself whereon the kind said to his ministers, "I wish to maintain the laws of the country ; I myself must be banished ; hence, I am going into exile." With these words the king gave up the government to his eldest son and retired to the forest. According to another story concerning Sudatta, a rich and religious-minded merchant and the prince Jaita, it is said that on one occasion Sudatta offered to purchase a pleasure garden belonging to the prince Jaita for dedicating the same to the Lord Buddha. The prince replied by saying that it was not for sale, unless it was laid over with crores of coins. Sudatta indicated his willingness to purchase the garden even at the price mentioned by the prince—who was, however, taken aback by this unexpected acceptance by the merchant. Realising that he was going to be deprived of his garden, the prince wanted to rescind the contract by holding that there was no actual sale of the garden. The merchant had to sue the prince in the court which gave a decree in favour of the merchant, as it was clearly found by the court that the sale in question had already been concluded by the legal offer and acceptance. After the decree when Sudatta had actually covered a portion of the garden with coins, the prince relinquished the remaining land without further coins. These stories indicate that even kings and princes were equally subject to the law of the realm.

The courts in ancient India were held in great esteem and judges were highly paid king's officers. According to Kauṭilya the salary of the Chief Justice was forty eight thousand paṇas[86] *per annum*. The Chief Justice was assisted by the puisne judges who were not so highly paid.[87] The court house was regarded as a sacred place and all trials were to be held openly, where all members of the public could have access. It was specifically enjoined that no trial should be held privately.

86. A paṇa was a silver coin.

87. Each puisne judge was paid only a salary of twelve thousand paṇas *per annum*.

CHAPTER VI

The early Dharmaśāstras of Manu, Yājñavalkya and Parāśara

1. Manu and Yājñavalkya—introduction

Manu and Yājñavalkya are undoubtedly the two most eminent jurists of ancient India. Each of them contributed in his own way to the development of Hindu Law by elaboration, systematisation and elucidation. Jayaswal has compared and contrasted the achievements of Manu and Yājñavalkya in a masterly way in his Tagore Law Lectures with the keenest insight of a true historian. But it is difficult to agree with him in some of his exaggerations. One ot his main contentions is that the origin of the positive or municipal Hindu Law must be sought in the Arthaśāstra and not in the Dharmasūtras and that the Dharmasūtras and the Arthaśāstras developed in two different channels. This antethesis can hardly be supported. As a matter of fact, the development was absolutely homogeneous, the earliest being the Dharmasūtras. The Arthaśāstra of Kauṭilya was written after the Dharmasūtras and many topics and notions were borrowed by the author of the Arthaśāstra from the Dharmasūtra literature. When Manu and Yājñavalkya came after the Dharmasūtras and the Arthaśāstra of Kauṭilya, they were also equally subject to the influence of the foregoing thinkers and their literature. And when we proceed still farther, we find that Nārada and Brihaspati also who belonged to the latest epoch of the Dharmaśāstra literature, were influenced by the previous writers alike. Had the contention of Jayaswal been true regarding the exclusiveness of 'Dharma Law' and Vyavahāra Law,' Manu and Yājñavalkya would not have dealt with the matters that were not strictly legal. As the Dharmasūtras contain legal matter only as a fraction of their whole contents, so the Arthaśāstra also was mainly a treatise on politics and treated law only as belonging to the judiciary which is an important organ of the state. There cannot be any doubt that both Manu and Yājñavalkya drew from the Dharmasūtras as well as the Arthaśāstra, though the latter dealt only with the secular science of politics. It is clear that Manu took the eighteen topics of law from the Arthaśāstra of Kauṭilya. Subject to the influence of Kauṭilya, both Manu and Yājñavalkya practically dealt with the Hindu Law almost in the same fashion as it was done by the authors of the Dharmasūtras. This also goes a great way in militating against the theory of Jayaswal regarding the exclusiveness of 'Dharma' laws and 'Vyavahāra' laws. As it has already been noticed, Manu and Yājñavalkya were immensely influenced by the foregoing authors;

nevertheless they could very well afford to have followed their own genius in the development of the Hindu Law. Yājñavalkya was, no doubt, more systematic and concise than Manu. The reasons are not far to seek. The authors flourishing later had the advantage of utilising the works of their predecessors and were in a better position to avoid things which were not to the liking of the society advancing in different directions. It is thus not unusual that Manu accepted the enumeration and the classification of the legal topics more or less on the model of Kauṭilya. In the rest of his work, he did not hesitate to discuss things almost in the same fashion as it was done by the preceding Sūtra-writers. Yājñavalkya made greater improvement by dividing the entire range of his subject-matter into Ācāra, Vyavahāra and Prayaścitta. In his chapter on Vyavahāra, Yājñavalkya deals with law in its various aspects. As Manu and Yājñavalkya came after many jurists, naturally, they must have been influenced by many of them consciously or unconsciously. The outstanding calibre of Manu and Yājñavalkya is undoubted; hence, even when they borrowed from others, the borrowed principles and notions were given, by their own genius, the appearance of originality as regards treatment.[1]

In both Manu and Yājñavalkya, there are instances of over-legalsation as there are instances of under-legislation in the Dharmasūtras. Thus according to the Dharmasūtras, sometimes many offences, which according to modern conception of criminal jurisprudence were to be punished by the king or the state were punished simply by the performance of Prāyaścitta; according to Manu, if a Brahmin worthy of invitation in *shradh* is not invited by a neighbour, the neighbour shall be fined. Similarly according to both Manu and Yājñavalkya, a man, capable of helping a man in distress, shall be fined, it he does not go to his help. Another important contention of Jayaswal is that as the Code of Manu was written during the rule of Brahmin kings, so the Brahmins were made the lord of everything; but that this position was much softened down during the time of Yājñavalkya who acted to moderate many of the extreme views of Manu. But a close scrutiny of this observation will show that it is not fully corroborated[2] by

1. This is, in a sense, true of all the Smriti writers. Whenever anything is quoted or borrowed from others, even the slightest indication will not be found that these are cases of borrowing. It often becomes greatly difficult to ascertain who the original author of a particular text is, when we see that it is freely used by more than one text writer.

2. The whole of Hindu Law is based on the conception of Varṇa-dharma and Ās'rama-dharma. The Dharmasūtras also have extolled the position of the Brahmins. Hence, it cannot be said that it was Manu who for the first time made the Brahmins lord of all. This was also true of the codes of Nārada and Brihaspati, to a very large extent.

the writings specially of the Sūtra period and the codes of subsequent periods. Some important features of difference between Manu and Yājñavalkya have been brought out by Kane.[3]

Again, Kane rightly points out that[4] "Yājñavalkya's work is more systematic than that of Manu." With these general observations regarding Manu and Yājñavalkya, let us discuss each of the Smritis in details regarding the provisions of law made by each of them.

2. Manu

Manu devotes the 8th chapter of his Smriti mainly to the treatment of law,[5] consisting of 18 topics.[6] For the purpose of deciding, the king should enter the court house with learned Brahmins and experienced councillors preserving a very dignified demeanour.[7] The 18 titles[8] of law should be divided according to the usages and the institutes of the sacred law. When it is not possible for the king himself to administer justice personally, he should appoint a learned Brahmin, for that purpose but by no means should he appoint a Śūdra. The fault of an unjust decision is apportioned to the offender, the witnesses, the judges and the king.[9] Manu makes similar provisions like Gautama[10] and Vaśiṣṭha[11] regarding the protection of the property of a minor, of a barren woman and of an owner of property who has disappeared. Property lost and recovered shall be kept in the custody of the king's special officers ; those convicted of stealing such property shall be slain by elephants.[12] When a Brahmin finds a treasure-trove, he may be entitled to the whole of it, as he is the master of everything. The king must restore the

3. History of Dharmas'āstra, Vol. 1 p. 180.

4. Ibid, p. 176.

5. According to Medhātithi, administration of justice is one of the eightfold duties of the king.

6. These topics more or less resemble those discussed by Kauṭilya in Books III and IV of his Arthas'āstra and the foregoing Dharmasūtras.

7. This was deemed imperative perhaps to inspire confidence in the litigants.

8. A comparison between the enumeration of the legal topics by Kauṭilya and Manu will point out certain important points of similarity and difference. None of these enumerations is exhaustive. Both of them include many things which are not strictly covered by the topics concerned. Kauṭilya deals with robbery, assault and defamation in Book III and offences against the sex in Book IV, while Manu deals with some residuary topics, not covered by the main topics. Theft and robbery are discussed together by Kauṭilya and separately by Manu.

9. Gautama, XIII, 11; Baudhāyana, 1, 16, 8.

10. X, 48.

11. XVI, 8.

12. A special sanctity is attached to such property and hence, this drastic punishment for stealing it has been provided for.

stolen[13] property when recovered and must compensate when unrecovered;[14] he shall also administer the law by taking into consideration, the special laws of the Jāti, country, guilds, families and men who follow a particular occupation and abide by a particular class of duty likely to be tied together by a similar body of rules.[15] The king and his officers should neither encourage litigation nor hush it up; unnecessary adjournments also should not be allowed.[16] The king should concentrate his mind to the adjudication of a case in all its aspects remembering that "Justice being violated destroys, justice being preserved preserves."[17] Manu deals with debt and its realisation in great length and provides a long rope for the creditor for realising his debts by any means.[18] In this connection, the necessity and conduct of witnesses also have been discussed. People of all castes including women may be competent witnesses specially in criminal cases.[19] He enunciates a quite new principle regarding the conflict of witnesses. On a conflict of the witnesses, the king or the judges shall accept as true, the evidence of the majority; if the conflicting witnesses are equal in number, that of those distinguished by good qualities and on a difference between the equally distinguished and meritorious witnesses, that of the best among the twice-born.[20] Evidence shall always be direct.[21] Different classes of witnesses have got to be differently exhorted[22] and he who gives false evidence is firmly bound by the fetters of Varuṇa.[23] The wicked cannot, however, hood-wink by saying that nobody sees them. False evidence only

13. Brahmins were treated with the highest respect and on many occasions they were to be governed by special legal provisions. This was virtually the case throughout the whole ancient history of Hindu Law.

14. This implies a high sense of responsibility and duty imposed on the king.

15. It indicates that the law should be treated more as personal than as local.

16. Cf. Kauṭilya's Arthas'astra, Book III, Chapter I.

17. Manu, VIII, 15, 45.

18. By means of persuasion, suit of law, artful management, customary proceeding or force.

19. Manu describes different classes of incompetent witnesses and provides that women should be witnesses for women only and each class must have witnesses from that class alone; but at the same breath, he provides generally that any person having personal knowledge of a particular fact may give evidence in that respect specially on failure of competent witnesses; but the evidence of women, infants and the aged must be considered with great caution, (VIII 71).

20. Manu, VIII, 73.

21. Ibid, 75.

22. Āpastamba, II, 29, 9-10 Gautama, XIII, 14. 22; Vas'iṣṭha, XVI. 32-34; Baudhāyana, I, 19, 19-20.

23. Varuṇa has been invariably associated with all kinds of sins and their punishments.

for pious object such as saving the life of a man can escape punishment, by proper expiation to Varuṇa. Manu has also referred to oaths and ordeals, but he has not described them[24] in details like the subsequent Smriti-writers. He has also added one special mode of oath in giving evidence[25] by touching the heads of wives and children, implying thereby that the false evidence in these cases would result in the death or injury to the wives or the children. For false evidence and other crimes as well, a Brahmin can only be banished from the kingdom, unhurt in body and property. In awarding punishment, the king should fully take into consideration, the time, place, motive and other facts and circumstances of the case. Manu also advocates different degrees of punishment beginning from simple admonition and ending with corporal chastisement. The intermediate punishments were harsh reproof and fine. In case of necessity all the four methods also can be used conjointly. Manu appears to make another peculiar provision according to which judgments based on false evidence must be reversed by the very judges who passed them.[26]

3. Civil law

The topics discussed by Manu are pledge, deposit,[27] adverse possession, Damdupat and exceptions to the application of the principle of adverse possession. The pledgee using the pledged property by force or fraud shall be liable to forfeit the interest and compensate the loss or damage. A chattel is lost by ten years' adverse possession ; but this rule does not apply to a pledge, deposit, open or sealed, boundary, the property of a minor, idiot, woman, Śrotriya or the king.[28] A man who becomes a surety for a debtor must pay from his own pocket, but his heirs are not liable to pay any immoral debt, money due by a surety or idly promised or lost at play or due for spirituous liquor or what remains unpaid of a fine or a tax.[29] A

24. Though Manu has not given any particulars regarding oaths and ordeals, he has referred to some concrete instances, such as of Vas'iṣṭha, Sudās and Vatsa who underwent oaths and ordeals.

25. Punishment differed according to the difference in the motive for giving false evidence, (Manu, VIII, 119).

26. Anything done under these judgments must be regarded as not done. According to Govindarāja, Kullukabhaṭṭa and Nārāyaṇa also fines imposed must be remitted. (Manu, VIII, 117).

27. See Gautama, XII, 31, 36 for Damdupat. A man is not liable, if the deposit with him is lost without any fault of his, (VIII, 189).

28. Gautama, XII, 37-39 ; Vas'iṣṭha, XVI, 16-18.

29. Manu applies the exception to case of surety for appearance only. But in case of payment of money by which the family was benefitted, the heirs also should be liable. Thus a distinction is made, if anything was received or not by the surety. This principle is undoubtedly based on sound logic which was also regarded as a settled rule, (VIII 162).

contract entered into with force or fraud is void, Similarly a sale without ownership is void and the seller is to be punished as a thief. A heavy punishment is to be inflicted specially on the seller, where he happens to be a kinsman of the real owner. Adulterated commodities must not be sold as pure nor bad as good ones. Any other kind of fraud also is equally punishable. In this connection, Manu also provides that if after one damsel has been shown, another be given to the bridegroom, he may marry them both for the same price.[30] But if the blemishes of a bride are declared openly beforehand, the bride's father or guardian is not to be punished. In the performance of a sacrifice[31] if a priest abandons his work in the midst of it, he shall be given only a portion of his fees according to the principle of *quantum meruit*. An ordinary hired servant abandoning his work in the midst of it cannot be entitled to any wages ; on the contrary, he shall be liable to be fined by the king.[32] But no wages are to be barred by limitation. Manu also provides for the mutual relations between the owners of cattle and herdsmen *per se* and the apportionment of the responsibility of the damage done by the cattle to the crops of third persons.[33] In case of death of any cattle, the herdsmen must produce some parts of its body for the proper identification of the cattle and satisfaction of the owner.[34] The disputes regarding boundaries of villages, fields, wells, tanks, gardens and houses must be determined by some marks or the evidence of the witnesses of the neighbourhood. The village boundaries should be demarcated externally by trees and shrubs and internally by stones, bones, ashes, potsherds and bricks etc. and the best time for determining them is the month of Jyaiṣṭha, when all marks are clearly visible and discernible.[35]

30. This refers to the Asura form of marriage which is regarded as a sale. Manu is here discussing various topics without logical connection with one another. This indicates a lack of system in the arrangement which was greatly improved upon by Yājñavalkya.

31. This illustration gives an idea of the social conditions prevailing at that time. The legal principles were to be applied to secular and religious functions also and in ancient India the latter played a much more important part. (Cf. Cāṇakya, Book IV, Chapter XIV).

32. A man belonging to a corporation, inhabiting a village or a district after swearing to an agreement or contract and breaking it through avarice or any other insufficient reason, shall be banished by the king from his realm, (Manu VIII, 219).

33. The provision made by Gautama, (XII, 19-26) and Āpastamba, (11, 28, 5) are clearer and more precise.

(For comments, see ante, Chapter IV, 5).

34. Manu, VIII, 234.

35. But if the boundaries cannot be ascertained by marks or evidence, the king as arbitrator should demarcate them with the best of his intentions, (Manu, VIII, 265 ; Cf. Vas'iṣṭha, XVI, 13-15).

4. Criminal law

The entire law of defamation was mainly based on the variation of caste.[36] Obviously, the heaviest punishment was reserved for the Śūdras, specially, when they defamed the Brahmins.[37] A Śūdra insulting a twice-born man with gross invectives shall have his tongue cut-off, the reason being that he is of low origin; if he mentions the name of twice-born classes with contempt, an iron-nail ten fingers long shall be thrust red-hot into his mouth and if he arrogantly teaches Brahmins their duties, the king shall punish him by pouring hot oil into his mouth and ears. As in defamation, so also in assault, nearly the whole of the law is mainly determined by reference to the question of caste.[38] Manu also provides for criminal punishment in the shape of fines for those who hurt trees,[39] plants, animals[40] and even inanimate goods.[41] In cases where hurt is caused to men and animals through the negligent driving of carriage, the driver and the owner are to be fined, unless there is any negligence to be ascribed to the man hurt. In this connection, Manu refers to the opinions of his predecessors according to whom there are at least ten cases where the driver is absolved from liability. In all these cases it is presumed that the injury is caused by some unforeseen incidents or accidents.[42] If a man is killed by rash and

36. The caste was undoubtedly the most important and obvious factor in determining the status of a person in the ancient Hindu society.

37. Cf. Āpastamba, 11, 17, 14; Gautama, XII, 1, 8-14; Vas'iṣṭha, IX, 9.

38. The limb with which a man of low caste hurts a man of the three higher classes shall be cut off; a man raising his hand or stick shall have his hand cut off; and if a low-caste man tries to place himself in the same seat with a man of a higher caste, he shall be branded on the hip and banished. (Cf. Āpastamba, II, 27, 15 and Gautama, XII, 7).

39. Among trees and plants also some were treated as of special importance. Thus according to Govindarāja, the punishment will differ according as the tree gives only shade or bears only flower or bears fruit. Medhātithi also makes some special consideration for trees and plants used for demarcating boundaries and existing on cross-roads and hermitages. The reasons are obvious.

40. The punishments were to be proportional to the pain inflicted on the animals or the nature of the injuries caused on the different parts of the body.

41. This shows a very fine conception of juristic principle. Generally crimes are treated as offences against the state and they are punished as such. According to Manu damage done to goods shall be followed by compensation to be paid to the owner for his satisfaction and also by a fine to be paid to the king. The latter element implies the conception of crime which is after all an offence to an individual in the first instance and an offence to the state only remotely and indirectly through the individual affected.

42 The *mens rea* is absent in this case.

negligent driving, the driver shall be fined as a thief.[43] One of the most fundamental duties of the king is to protect the subjects against theft and other crimes. The king's receipt of taxes has got to be reciprocated by the protection to be vouchsafed[44] by him. It is the duty of the king to carefully restrain the criminals by imprisonment, by putting them in fetters and by corporal punishment. The nature of the punishment was to be determined according to the nature of the crime committed.[45] The presence of the element of violence in theft would convert it into robbery.[46] One of the most striking conception of law by the Hindu jurists including Gautama[47] and Manu is the direct variation of punishment according to the position and learning of the offenders.[48] The right of private defence was fully recognised even to the extent of killing the ātatāyin.[49]

Adultery was regarded as one of the most heinous[50] offences for which exemplary and deterrent punishments were provided for, so that they might create awe and fear in the minds of the people at large. A Śūdra guilty of adultery with a woman of any caste specially of the twice-

43. According to the commentators, Medhātithi, Kullukabhaṭṭa and others the driver shall be fined 1000 paṇas in case of men. Again when the death or hurt is caused to other animals, the punishment will vary according to their class, (Manu, VIII, 296-300).

44. As it has already been noticed, (See ante, Chapter II), the position of the ancient Hindu king implied a bundle more of duties than of rights. By doing his duty, the king was to go to heaven and his kingdom was to thrive. The reverse would always result in hell for the king after death and the wholesale destruction of the kingdom in his life time. Another very peculiar theory was developed by the Hindu jurists. It was this : Even a culprit when duly punished would go to heaven and even when he could not be punished for the fault of the king, it was the king who was to blame and not the culprit. (Gautama, XII, 43-45 ; Āpastamba, II, 25, 15, 4-5, Vas'iṣṭha, 1, 41, 42-44; Baudhāyana, II, 1, 16-17; Manu, VIII, 302-13)

45. For stealing more than 50 palas, the hands of the thief must be cut off, for stealing men and gems, capital punishment should be inflicted and for avoiding repetition of the crime, the offending limb should be cut off.

46. Cf. Kauṭilya, Book III, Chapter XVII.

47. XII, 15-17.

48. Where an ordinary man shall be fined one Kārṣāpaṇa, the king shall be fined one thousand ; in case of theft the guilt of a S'ūdra should be eightfold, that of a Vais'ya sixteenfold, that of a Kṣatriya, thirty-two fold and that of Brahmin sixtyfour or even one hundred twenty eight fold. (Manu, VIII, 336-38).

49. Even the Brahmins could take recourse to arms in private defence as well as in protecting the kingdom from external enemies and internal civil war. (Cf. Gautama, VII, 25, Vas'iṣṭha, III, 15-18 ; Baudhāyana, I, 18-23).

50. It was so regarded, as it would lead to the admixture and confusion of the caste system which was regarded as the main prop of the ancient Hindu society.

born class shall be sentenced to capital punishment.[51] A wife violating her duty towards her husband was to be devoured by the dogs in a place frequented by the public and the male offender was to be burnt on a red-hot iron-bed by putting logs under it.[52] Having dealt with the main topics of law—civil and criminal—Manu refers to certain miscellaneous topics such as non-fulfilment of agreements, specially among Brahmins, engaged in the performance of sacrifices, maintenance of parents, wife and legitimate children, non-invitation to qualified Brahmins of the neighbourhood, relaxation of rules for paying taxes by the blind, the idiot, the aged, the infant or the distressed, conduct of washermen, weavers,[53] monopoly,[54] fixation of price, examination of weights and measures and the duty of a ferryman. It is also the duty of the king to see that men of the different castes observe the rules of their respective classes. Manu recognises seven kinds of slaves who are not capable of owning any property like wives and sons.[55] Manu, in Chapter III, has dealt with the institution of marriage, its various forms, their relative degrees of excellence and the different formalities[56] to be observed and the rites to be undergone.[57] In Chapter IX, he has discussed the rights and duties of the husband and the wife. No woman should deserve independence at any stage and she should always be kept engaged, so that she may not find any opportunity or leisure to indulge in

51. Capital punishment was provided for only for the S'üdras independent of the caste of the woman in question. For committing adultery with a guafded Brahmin woman, a Vais'ya shall forfeit all his property and suffer imprisonment for one year; a Kṣatriya shall be fined one thousand paṇas and be shaved with the urine of an ass. For adultery with Brahmin women, they could be put to death. The punishment, again, varied, according as the woman was guarded and willing or unwilling. A Brahmin, however, could not be subjected to capital punishment; he was to be banished from kingdom—unhurt in body and property, after tonsure of the head. (Cf. Āpastamba, II, 20, 26, 27; Gautama, XII, 2-3; Vas'iṣṭha, XXI 2-3, 5; Baudhāyana, II, 3, 52).

52. Manu, VIII, 371-72.

53. Washermen and weavers have been treated as artisans by Kauṭilya in his chapter on Kanṭaka S'odhanam, (Book IV, Chapter I).

54. If any trader out of greed deals in any kind of goods which is subject to monopoly of the king, the whole of his property shall be confiscated. (Mānu, VIII, 399).

55. Sons cannot be regarded as owners of property during the lifetime of their father; the author of the Dāyabhāga bases his theory of absolute right of the father on this principle. The author of the Mitākṣarā expounded the theory of joint tenancy of father and sons and that theory was accepted in the whole of India except Bengal where the view of Jīmūtavāhana prevails. (Manu, IX, 104).

56. The utterance of the nuptial texts is a certain proof that a girl has been lawfully made a wife; according to the learned, the marriage ceremony is completed with the seventh step round the nuptial fire, (VIII, 227).

57. Āpastamba, II, 11, 17-21; IV, 6-15; Vas'iṣṭha, I, 17-35; Baudhāyana, 1, 20, 1-21, 23.

any vicious thought. Women according to Manu are wicked when left to themselves; but they become respectable only on account of their union with worthy husbands.[58] This view is the result of his prejudice against women who otherwise deserve to be respected on pain of divine displeasure.[59] He discourages the system of Niyoga which was believed to have been introduced during the reign of the godless king Vena[60] who was ultimately put to death by the Brahmins. Manu also describes the other kinds of sons[61] and enunciates the various principles of inheritance,[62] partition,[63] primogeniture and[64] exclusion from inheritance.[65]

5. Gains of learning, gambling and betting

Manu also recognises the principle of "gains of learning" according to which, what one brother may acquire by his labour without using the paternal property, shall not be liable to be shared by other brothers, unless the earner himself agrees to do so. (See Gautama,

58. Manu illustrates his point by reference to the unions of Akṣamālā and Vas'iṣṭha and Sarangī and Madanapāla.

59. Manu, III, 59.

60. This story is based on the paurāṇic and epic tradition. The institution of appointment was otherwise prohibited for the Brahmins under all circumstances, (Manu, IX, 64). In this connection Manu refers to many similes and analogies to prove that the husband of the woman cannot be regarded as the father of the son, born as the result of appointment. (Cf. Āpastamba, II, 13, 6-7 ; Gautama, XVIII, 9-14 ; Vas'iṣṭha, XVII, 6-9, 63-64).

61. According to Manu only the Aurasa son is entitled to inherit his paternal property ; but to avoid harshness, the rest of the sons are entitled to maintenance. Manu does not make any distinction between a son's and son and an appointed daughter's son in matters of this world and those of the next, (Manu IX, 133, 139). There is also a lot of difference in the status of sons born of mothers belonging to different castes, (Cf. Gautama, XXVIII, 35-39 ; Vas'iṣṭha, XVII, 48-50 ; Baudhāyana, II, 3. 10).

(62-63). Partition among sons is permissible only on the death of parents. (Cf. Gautama, XXVIII, 1 ; Baudhāyana, II, 3, 8.) It also meant increment of religious merit, (Cf. Gautama, XXVIII, 4). Sapiṇḍas, Sakulyas, spiritual preceptor and pupil and ultimately the king takes the property excepting the property of a Brahmin. Manu says that it is a settled rule that a Brahmin's property should not be taken by the king, (Cf. Āpastamba, 14, 5 ; Gautama, XXVIII, 42 and Vas'iṣṭha, XVII, 83). According to Manu no proprietory rights accrue to the children during the lifetime of their parents. Yājñavalkya's conception is quite otherwise.

64. According to Manu, either all sons may divide their paternal property equally or the eldest may take the whole subject to his duty of maintaining all the younger brothers. The reasons given for primogeniture also are very significant ; it is on the birth of the first son that the father becomes free from the debt due to his forefathers. Thus the eldest son is the real son (in the sense of redeeming the father from the hell 'put'), while the other sons, subsequently born, are only the result of desire or lust, (Cf. Gautama, XXVIII, 3 ; Baudhāyana, II, 3, 13)

65. Eunuchs, outcastes, persons born blind, deaf, dumb, insane, idiots as well as those deficient in any organ are entitled only to maintenance and not to any share but their children are entitled to share on the principles of representation. (Manu, IX, 201).

XXXVIII, 31; for the different views of the commentators, see Sacred Book of the East, Vol. XXV, P. 375). The last topic of law according to the classification of Manu concerns gambling and betting; the former relates to the use of inanimate objects, whereas the latter relates to the use of animate beings. Indulgence in gambling and betting makes a man equal to a thief or a Śūdra who assumes the distinctive marks of a twice-born[66]. Manu is strongly in favour of absolute prohibition of gambling and betting by banishing these culprits. Cāṇakya,[67] however, followed by Yājñavalkya[68], is in favour of allowing gambling and betting under state control for the direct and indirect interest of the state. Lastly, Manu enumerates certain miscellaneous offence with various kinds of punishment to be inflicted by the courts or by the society in the shape of penances; some of these offences are negligence and corruption of public servants,[69] including judges.[70] The mahāpātakas are killing Brahmins, drinking surā, theft of Brahmin's gold and the violation of guru's bed etc.[71] A virtuous king should under no circumstances take the property of a man guilty of mortal sin; if he accepts any such property out of greed, he must offer an equal amount of fine, in the name of Varuṇa[72] either by throwing it into the water or by giving it to a learned Brahmin.[73]

66. Manu, IX 221-229.

67. Arthas'āstra, Book III, Chapter XX.

68. II, 199-203.

69. The forgers of royal edicts, persons corrupting the king's ministers, slaying women, infants or Brahmins and helping the enemy of the state against its interest were to be sentenced to death.

70. In case of any unjust decision by a minister or by a judge, the king was to punish him with a fine of thousand paṇas after reversing the decision.

71. Details of punishment for mortal sins have been provided for by Manu. In these sins also, the questions of caste and the presence or absence of intention on the part of the offender are very material. For the mortal sins, the middlemost amercement shall be inflicted on a Brahmin or he may be banished from the realm, keeping his money and chattels. As regards men of other castes, those committing the crimes unintentionally ought to be deprived of their whole property and those committing the offences intentionally should be banished. (Manu, IX, 235-242).

72. Varuṇa has all along been associated with crimes and their punishments. This is to be found also in the otherwise secular provisions made by Kauṭilya in his Arthas'āstra. Varuṇa has been characterised as the supreme ruler (Adhirāja) even over kings, (Cf. Taittirīya Brāhmaṇa, III, 1.2 7.)

73. For the exalted position of the Brahmins, see Manu, I. 98-101, where they have been described as the lords of all created beings and the owners of the whole world of property.

6. Yājñavalkya

It has been rightly observed by Kane[74] that "on account of the paramount importance of the Mitākṣarā in modern Hindu Law, as administered by the British courts in the whole of India, the Smriti of Yājñavalkya has indirectly become the guiding work for the whole of India and this position it richly deserves by its concise but clear statement of principles, its breadth of vision and its comparative impartiality of the claims of both sexes and the different Varṇas." Jayaswal[75] also says that "his (Yājñavalkya) work being a purely scientific book, the scientific attitude and freedon from prejudice made the work acceptable throughout India. It was not a mere chance that jurists like Vijñāneśvara and Aparārka selected it as the basis of their writings." For the widest acceptance of the Yājñavalkya-Smriti, there might be other reasons as well besides its intrinsic merit and progressiveness. In many cases the exaggerated points of contrast referred to by Jayaswal, between the codes of Manu and Yājñavalkya are hardly tenable. He himself also is, to some extent, conscious of it. "Progressive tendency," combined with "orthodox conservatism" perhaps gives expression to that consciousness unconsciously. Again, by the significant expression, "Dharma-Vyavahāra" law, Jayaswal means the admixture of the laws as found in the Dharmaśāstras on the one hand and the Arthaśāstra on the other. Here also the extreme theory of Jayaswal that the subsequent law codes must be regarded as having originated with the Arthaśāstras, specially that of Kauṭilya, can hardly be regarded as wholly correct. He is not fully justified in calling the codes of Manu and Yājñavalkya as "unhistorical amalgamations" of the canonical as well as the secular laws. As a matter of fact, the codes of Manu and Yājñavalkya were only the natural and logical growth of the so-called legal codes beginning with the Dharmasūtras and only intervened by the Arthaśāstra of Kauṭilya. It does not require much reflection to see that Kauṭilya also dealt with and accepted many notions and principles already treated by the authors of the Dharmasūtras and Manu and Yājñavalkya also were greatly influenced both by the Dharmasūtras and by the Arthaśāstra, though in most of the cases, the debt was hardly acknowledged. It is also true, to some extent, that every subsequent author was in a much better position to assimilate and utilise the works of the foregoing authors and thereby make necessary improvements, as needed by the society and the spirit of the time. In this sense, as Yājñavalkya flourished after the authors of the Dharmasūtras, the Arthaśāstra and the code of Manu, so he was in a much more advantageous

74. History of Dharmaśāstra, vol. I, p. 190.
75. Manu and Yājñavalkya, Tagore Law Lectures, (1917), pp. 61-62.

position to examine the whole range of works and accept and reject certain principles of others and enunciate certain principles of his own. Yājñavalkya's was the last important code of the mixed type of Dharma-Vyavahāra law which was so long ruling over the country. He divided the contents of his code clearly into three kāṇḍas, the second kāṇḍa having been devoted to the treatment of law. There is nothing to indicate the exact time when Yājñavalkya lived and wrote his famous Smriti. His probable time has got to be sought between the first four centuries after the birth of Christ.[76] One of the most important features of the ancient Hindu legal literature is that there were many principles and ideas common among the jurists. Particularly the subsequent authors had been influenced by the previous jurists. The similarity between them does not end with mere ideas and notions; often the very language in which they were clothed was almost identical. In the result, the major portion of the writings of all the jurists can be more or less traced to the writings of the foregoing authors. In this sense, the scope of original treatment was very much restricted in nature and extent. Nevertheless, subject to these general conditions, each ancient jurist contributed in his own way to the harmonious development of the Hindu Law.

7. General provisions for judicial procedure, debts and deposits

The king is primarily responsible for the administration of justice with the help of learned and virtuous assessors. In case of unavoidable pre-occupation, a learned Brahmin should replace the king. Any judge or assessor doing any deliberate injustice should be punished by the king to the extent of double the amount in dispute. The allegations of the plaintiffs should be recorded. This will be the plaint. The plaint will be followed by written statement, which also should be recorded similarly. Then will follow the proof. The last stage will be the judgment. Thus the four stages of litigation are plaint, written statement, proof and the judgment. Generally, no counter-suit will be allowed except in cases of certain crimes. The party losing the case will be liable for penalty besides the payment of the claim. Yājñavalkya enumerates certain characteristics of false witnesses.[76] Ordinarily, the witnesses of the first party are to be examined first; but if the first party be invalidated, the witnesses of the second party should be examined. In case of special wager, the party losing the suit must pay it along with other dues. The king should decide cases according to the spirit and not the letter of law.[77] When a defendant

76. See ante, Chapter I., Cf. Nārada.
77. Yājñavalkya, II, 19.

denies the claims of the plaintiff and whenever a part of the claim is proved against him, the defendant shall be compelled to pay the whole claim of the plaintiff. In case of conflict between two Smritis, that which is supported by practice and reason should be followed.[78] The Dharmaśāstras are superior to the Arthaśāstras. The different means of proof are document, possession and witnesses. Ordeals are to be resorted to only in their absence.[79] By adverse possession for twenty years in case of immovables and ten years in case of movables, the owners are to forfeit the property. This rule will not apply to the properties of minors, women, kings, deposits and boundaries etc. For misappropriation of pledges, the pledgee is to be liable for compensation ; mere title without possession cannot be perfect. Yājñavalkya refers to the different kinds of courts of the Pūgas, the Śreṇis, and the Kulas. Fraudulent transactions could not have any legal consequence. All improper contracts between father and child, husband and wife, master and servant and preceptor and pupil should be declared null and void. Vijñāneśvara discourages these transactions as liable to be vitiated by undue influence, as the relationship between them is of a fiduciary character. Things lost and recovered should be returned to the real owner on proper identification. The treasure-trove should be distributed according to law. A Brahmin finding a treasure should be the owner of the whole of it, as he is the master of the world.[80] The king must replenish the property stolen or robbed but not recovered.[81] Yājñavalkya refers to the different kinds of interest and the rights and duties of the lenders and borrowers.[82] Immoral debts are not to be paid by the heirs. The details are more or less identical with the provisions already referred to. The law of debts was treated at some length by all the ancient jurists of India. It was considered from the religious, moral and legal standpoints. The law of deposit was treated as analogous to that of debt. The question of deposit was based on confidence and hence, any breach of confidence was to be dealt with severely. The depository was to be punished in case of unauthorised use or wilful or negligent destruction of the property deposited. Rate of interest was to be determined with reference to the caste. The Brahmins were to pay the minimum interest, as they were the lords of the world. A creditor can realise his loan by any means including Chala etc., as they have been enumerated by Manu. There is also a

78. Ibid, II, 21.

79. See ante, Chapter I.

80. Manu, VIII, 40.

81. This implied a very high standard of duty on the part of the ruler. A similar provision was found during the Muslim rule in India also.

82. Cf. Vas'iṣṭha, Gautama, Kauṭilya and Manu, as discussed above.

peculiar provision made on this point by Yājñavalkya : when a creditor takes some property of the borrower and if the latter complains before the king, he will be compelled to pay the loan. This provision appears to have been made on the general maxim of equity, viz., that he who seeks equity must do equity. In cases of two or more mortgages, again, the first in time shall prevail. This is also true of some other similar transactions. Suretyship is ordained for appearance, trust and payment. Sureties alone are liable in case of default in the first two cases. In the third class, the sons also are liable but not the grandsons. Vijñāneśvara also corroborates this view of Yājñavalkya. In case of more than one surety, their liablility will be according to agreement, if any, and in absence of agreement, it will be treated as joint and several according to the wishes of the creditor. A usufructuary pledge is never forfeited. The creditor is not responsible for the loss or damage of the pledge, if it is due to Act of God or the king. If the pledgee refuses or fails to return the pledged property, when the loan is offered back by the borrower, the creditor shall be deemed as a thief.

8. Means of proof—witnesses, documents and ordeals

Possession[83] as a means of proof has been already discussed in connection with adverse possession. Generally speaking, there should be three witnesses ; but one witness also may suffice, if he is extraordinarily virtuous and reliable and if he is approved by both the parties.[84] The qualifications and disqualifications of witnesses have been enumerated[85] in details by Yājñavalkya. False evidence is a heinous offence entailing loss of heaven and heavy punishment in hell. It is also equally sinful not to give evidence on a fact known to a man.[86] A false witness and a witness unwilling to depose are equally sinners. In case of conflict, the evidence of the majority should be accepted ; in case of equal division, the testimony of the most virtuous is to be adhered to. A man giving false evidence to save the life of a Brahmacārin does not commit any sin. But in that case, some penance must be performed. Yājñavalkya has provided for many details regarding the execution of documents. Thus they must contain some particulars regarding the identity of the parties and the nature of the transactions and they must be invariably signed by the executants and the witnesses. The signature of the executant alone can be good evidence, if it is not obtained by fraud, force or any other vitiating factor. In case of loss or destruction, a document can be replaced by another with the sanction of the king. The

83. See the paragraph just above.
84. Yājñavalkya, II, 72.
85. Ibid, II, 68-71.
86. A similar provision was made in the law as administered during the Muslim rule.

contents of a document should be adjudged with reference to the facts and circumstances of each particular case. Payment made must be noted on the back of the document; moreover, there shall be independent acknowledgement by the creditor. After the payment of the entire dues the document should be torn. Yājñavalkya[87] refers to ordeals by balance, fire, water, poison and Koṣa. Koṣa means drinking the water in which an idol has been washed. In applying ordeals, the plaintiff must undertake to undergo punishment in case the allegation is not proved or the accusation is not substantiated. This was undoubtedly a very wholesome check for the accused to be immune from unnecessary harassment and imaginary allegation; in a sense, this served, to some extent, the purpose of presumption of innocence,[88] in behalf of the accused person. In case of the Koṣa ordeal, the accused person was to be declared guilty, if any serious calamity befell him within 14 days.[89] Yājñavalkya prescribes different ordeals for different persons according to their individual conditions.

9. **Partition and inheritance**

The father may divide the property among his sons equally or unequally, giving at his discretion the best thing to the eldest son. Regarding the authority of the father to make unequal distribution, different opinions have been held by the different commentators.[90] If the partition takes place after the death of the parents, the sons shall divide the assets and liabilities equally. Gains of learning are not subject to partition among the brothers. According to Yājñavalkya, sons and father have similar and joint interest in land, corody and wealth received from the grandfather. This provision has been subject to important discussion by the different commentators. The conception of joint tenancy of the Mitākṣarā school is based on this provision of Yājñavalkya. The terms corody and wealth have been differently interpreted. Vijñāneśvara and others who held a son's ownership to be co-eval with his birth put forward this text of Yājñavalkya as the basis or authority of their theory. Jīmūtavāhana, however, explains it as intended to secure to the son of a deceased son a share in the grandfather's property which he otherwise would not have got. The Subodhinī says that this text applies in the case of a grandson whose father was united with the grandfather and is dead. The Vīramitrodaya observes that the legal ownership of the father and the son is recognised by this text in the

87. This practice is still actually followed in our country.

88 See ante, Chapter I.

89. Yājñavalkya, II, 114-115. For discussion on ordeals in general see Ibid.

90. See supra, Chapter VIII, IX.

ancestral property as contrasted with the self-acquired property. The Vyavahāramayūkha takes the word grandfather to include great-grandfather also. Unmarried sisters are entitled to the cost of their marriage ceremonies from the brothers by taking one-fourth of the brother's share. Regarding this one-fourth share, there has been a difference of opinion among the different commentators. Vijñāneśvara says that a quarter of the share means the quarter of the share which she should have got if she had been a son. Vācaspati, mentioning the Ratnākara and following the text of Viṣṇu "Anūḍhānān tu kanyānām svavittānurūpeṇa saṃskāram kuryyāt," says that the marriage ceremony of unmarried sisters should be performed according to his wealth ; the word quarter is used here not in its plain sense but simply to enjoin the allowance of as much as will suffice for the marriage of the sister. Śūlapāṇi, the Smriticandrikā, Bhāruci and Jīmūtavāhana agree with Vācaspati. Vijñāneśvara and the Vīramitrodaya reject this interpretation. Aparārka, Medhātithi and the Mayūkha agree with Vijñāneśvara. Yājñavalkya then refers to the different kinds of sons and their relative excellence with their rights and duties in connection with inheritance and succession.[91] He also enumerates the order of succession.[92] A mother is to be given equal share with the sons. The strīdhan of a childless woman goes to the husband, if the marriage is in the approved forms and it goes to her parents in case of disapproved forms of marriage. But if she leaves issue, it will go to the daughter. An impotent, an outcaste, a blind and an incurably diseased man will be entitled to maintenance only.[93]

10. Boundary disputes and disputes between masters and herdsmen

A boundary dispute should be decided by internal as well as external marks and witnesses, specially consisting of elderly neighbours.[94] Yājñavalkya also refers to the construction of embankments and wells round and in one's fields for the benefit of many. In the last verse, he refers to the compensation to be paid by a cultivator who undertakes to cultivate another's land in vain.[95] In discussing the rights and duties of the masters and herdsmen, Yājñavalkya first of all enumerates different

91. Yājñavalkya, II, 127-134.
92. Ibid, II, 135-139.
93. Ibid, II, 140-141.
94. Manu, VIII, 245-61 ; Vas'iṣṭha, XVI, 13-15.
95. Strictly speaking, this has nothing to do with boundary dispute.

kinds of fines and compensations for injury done by different classes of cattle.[96]

11. Sale, gift, service, contract and non-payment of wages

When a man claims a thing as purchased, he shall be apprehended and detained, until he can produce the person from whom he purchased and the actual owner demands that this property was lost or stolen. It is risky to purchase anything from a suspicious character or in secret or for inadequate price or at an unusual hour. When the seller is found out, the real owner will get the thing, the buyer his price and the king his fine from the disposer of the stolen or lost goods.[97] Any lost or stolen property unclaimed shall be disposed of by the king after waiting for one year. No gift of property should be made without already having made adequate provision for the members of the family. This was undoubtedly a very wholesome restriction.[98] Yajñavalkya allows different periods during which the articles purchased have got to be returned. He makes a very equitable and comprehensive rule by saying that the cases should be considered on the peculiar facts and circumstances of each case.[99] A slave could be released by paying ransom or if he has saved the life of his master: a man enslaved by force or by being sold by robbers could be unconditionnally released. An apprentice should remain in the house of the master until the expiration of the stipulated period.[100] Generally speaking, customary laws as well as usages should be carefully unheld, if they are not inconsistent with the revealed law. The king also should preserve the peculiaritics and conserve practices of Śreṇis, Naigamas, Pākhaṇḍis and Gaṇas.[101] He who embezzles the money of a Gaṇa or a public body should be banished after confiscation of his property. The labourers should be paid their wages fully on the completion of their work and on the basis of "*quantum meruit*" when it is done partially. In absence of any stipulation, reasonable remuneration should be paid by every employer; the employees also should take care of the implements of the employers.[102]

96. In ancient India, cattle, specially cows, constituted the most important item of property. In the Ṛgveda, prayers were made for being favoured with the gift of cows. Hence, the herdsmen as a class have been invariably discussed by all the sages. The importance of rearing cattle also can be gathered from the provision made for having sufficient pasture land for each village, country, city or town.

97. Vijñānes'vara rejects the interpretation of this text, as given by S'rīkara Aparārka and S'ūlapāṇi agree with Vijñānes'vara.

98. In Mohomedan Law also, a man cannot will away more than one-third of his property.

99. Yājñavalkya, II, 177-181; Manu, VIII, 212-14.

100. Manu, VIII, 410-420.

101. Manu, VIII, 218-221.

102. Ibid, VIII, 219-220.

12. Partnership, gambling and betting

Partnership associations could be formed according to Yājñavalkya by traders, sacrificers, agriculturists and artisans.[103] The members would adjust their profit and loss according to capital and agreement. A member would be liable to compensate others for his negligent act, whereas at the same time, he would be entitled to special consideration for his specially meritorious service. Gambling and betting were recommended by Yājñavalkya, like Kauṭilya, to be organised under the state control by a superintendent who was also to be appointed from among the gamblers. The disputes among these bodies also were to be decided by the gamblers themselves. The state was to receive its specified share from the gambling associations. Besides the revenue, the gambling house could serve as a helpful means for detecting crimes and offenders.

13. Crimes

Abuse, assault, sāhasa, theft and adultery were the different types of crimes, as enumerated by Yājñavalkya. Abuse or defamation was to be adjudicated chiefly with reference to the question of caste of the different parties.[104] Commenting on this verse, it has been held by Vijñāneśvara that a Kṣatriya, a Vaiśya or a Śūdra abusing a Brahmin would be punished with a fine of 100 and 150 paṇas and beating and mutilation respectively. A Vaiśya or a Śūdra abusing a Kṣatriya is to be fined 100 or 150 paṇas respectively. A Śūdra abusing a Vaiśya is to be fined 100 paṇas. A Brahmin on the other hand abusing a Kṣatriya, Vaiśya or Śūdra was to be fined 50, 25 and 12½ paṇas respectively. A Kṣatriya abusing a Vaiśya or a Śūdra was to be fined 50 and 25 paṇas respectively. Lastly, a Vaiśya abusing a Śūdra was to be fined 50 paṇas. For imprecatory threat, a feeble man had to be fined ten paṇas and an able man had to be fined and bound down to keep the peace. The highest fine shall be imposed for abusing a Brahmin, the king or Gods. Yājñavalkya describes the different kinds of assaults and provides for their punishment. Here also the Brahmins are to be treated preferentially. A Non-Brahmin striking a Brahmin shall have his offending limb cut off. Where the man is assaulted by many conjointly, the punishment shall be doubled. Yājñavalkya also makes provision for punishing assault, committed in respect of animals and plants as well. The fines shall be doubled, when any injury is done to a tree in a sacrificial place, cemetery, boundary or a temple.[105] A sāhasa or a heinous offence is

103. Ibid, VIII. 206-211.
104. Yājñavalkya II, 207.
105. Manu, VIII, 278-301.

committed according to Yājñavalkya, when a common or another's property is taken away by force. For sāhasa, the fine shall be double the value of the thing taken, but four times when the offence is denied.[106] A man instigating another to commit a sāhasa has to be fined four times the amount of the reward offered. In this connection, Yajñavalkya enumerates several other offences, such as, cheating, criminal misappropriation, criminal breach of trust and their punishments. The most important group of offence comprises those in connection with trade and commerce. Yājñavalkya has provided for elaborate rules for the regulation of trade and commerce, where the prices were to be fixed by the king. From these elaborate provisions, Jayaswal[107] has rightly concluded that Yājñavalkya flourished and wrote at a time, when there was a general prosperity in the country in the shape of trade and commerce. Thieves should be apprehended with the help of the detectives. Suspicious character and previous convicts should be arrested and examined in cases of theft. If they cannot explain their conduct or remove the suspicion on them, they will be punished as thieves. In cases, where theft cannot be detected or the stolen property cannot be traced, the king's officers and villagers concerned are to blame and the latter are to compensate for the unrecovered stolen property. Bandigrahas, the stealers of horses and elephants and the violent murderers had got to be impaled on a stake. In punishing theft, the time, place and all other relevant factors of allegations must be duly considered. Screening thieves was to be punished with the highest fine. Different modes of capital punishment were provided for by Yājñavalkya for different offences. Superlatively wicked women killing men and breaking reserviors were to be plunged into the water after being tied to a stone. A woman killing her husband or child, burning a house or village should be killed by a bullock. In case of murders, investigations should be conducted on hypotheses framed according to the suspects' inclinations and antecedents. Burning was the punishment for those who would burn a thrashing floor, a house or who would carnally know the wives of the king.[108] Yājñavalkya uses the word adultery in a wide sense and this offence was to be proved mainly by circumstantial evidence. Regarding the punishment, the question of caste again was very important. An Antyaja committing this offence against an Ārya woman was to be put to death like a man defiling a maiden of the higher class.

106. Ibid, VIII, 332, 344-47.
107. Manu and Yājñavalkya, (Tagore Law Lectures).
108. Manu, VIII, 302-343.

14. Miscellaneous

Yājñavalkya adds a miscellaneous section consisting of 13 verses at the end of Chapter II. Any man adding to or deducting from a king's edict was to be punished with the highest amercement like a man offering prohibited food to another. He also gave certain instances where the wrongs committed by certain animals could not entail any punishment for their owners.[109] Anybody imprecating against the king, calumniating him or divulging his secret counsels should have his tongue cut off and then banished from the kingdom. Anyone selling any property from a dead body or sitting on the king's throne or carriage should be punished with the highest amercement. An unjust decision was to be reviewed by the king. A man losing an appeal against a just decision should pay a double fine. The king also receiving any unjust fine should pay it to the Brahmins with his own hand, increased thirtytwo fold.

15. The Parāśara-Smriti

Parāśara seems to have occupied a very prominent position amont the ancient Smriti-writers, so much so, that he claims to be the sole guiding Smriti-writer for the Kali age. The classification of the different ages and the specification of the different authorities have been given in the following verses attributed to Parāśara[110] :

Anye Kritayuge dharmāḥ Tretāyāṃ Dvāpare pare
Anye Kaliyuge nṛīṇām yūgarūpānusārataḥ
Krite tu Mānava dharmāh Tretāyāṃ Gautamaḥ smritaḥ
Dvāpare Śankha-Likhitau Kalau Parāśaraḥ smritaḥ"

The assertions in the above verses cannot be taken too seriously. So far as the first verse is concerned, the difficulty is not as great, since it simply tries to assert that according to the needs of the different ages, different laws should be devised and resorted to. But the second verse has got certain historical and chronological difficulties. As it is, the second verse gives the order of succession among the different authorities thus—Mānava Dharma for the Krita or Satya yuga, Gautama Dharma for the Tretā yuga, the Dharma of Śamkha-Likhita for the Dvāpara yuga and the Parāśara Dharma for the Kali yuga. As it has already been seen in the chapter on the Dharmasūtras, Gautama is undoubtedly the earliest of the Sūtra-writers; but the Mānava-Smriti can by no means be said to have preceded the Gautama Dharma-Sūtra. "Mānava" might have referred

109. Yājñavalkya, II, 238-300.
110. I, 21, 24.

to the Mānava Dharmasūtra whose very existence has been rightly questioned. Śankha-Likhita again were not so prominent writers as to have deserved the proud position of ruling an entire age. As a matter of fact, their original Dharmasūtra has not even survived at all. What we possess at present is nothing but two collections of verses. Lastly, Parāśara has been declared as the ruling authority for the Kali age. Apparently the first three authorities belong to the Dharmasūtras and only Parāśara seems to be the author of a Smriti. There is also some confusion regarding the identity of Parāśara. It might be that there were one or more Parāśaras also writing on politics, as frequently referred to by Kauṭilya. It seems more probable that Parāśara was the author of a book on politics. This will be corroborated by the Parāśara-mādhavya.

The extant Parāśara-Smriti consisting of twelve chapters and 592 verses deals only with Ācarā and Prāyaścitta and not with Vyavahāra at all. From the verse[111]

"Kṣatriyo hi prajā rakṣan śastrapāṇi pracaṇḍavat,
Vijitya parasainyāni kṣitiṃ dharmeṇa pālayet,"

Mādhavācāryya introduces the topics of Vyavahāra covering one-fourth of his commentary with these remarks:

"Ataevācārakāṇḍe vyavahārāṇāmantarbhāvamabhipretya Parāśara prithag vyavahārakāṇḍamakritvā kṣitiṃ dharmeṇa pālayediti sūcanāmātraṃ vyavahārāṇaṃ[112] kritavān."

The most famous śloka of Parāśara is "Naṣṭe mrite etc." which was utilised by great-souled Iśvara Candra Vidyāsāgar in advocating the śāstric legality of Hindu widow-remarriage. The last portion of Parāśara's text ran as "Patiranyo na vidyate." Obviously, it was misread for "Patiranyo bidhīyate." Another peculiarity of Parāśara-Smriti was that it enumerated only four kinds of[113] sons and it eulogised the Satī-rites. Parāśara has been frequently referred to and quoted by Kauṭilya, Vijñānesvara, Aparārka, the Smriticandrikā and Hemādri. There is also reference to Brihat Parāśara and Briddha Parāśara who are different authors. The Parāśara-Smriti must have been written before the 5th century A.D.[114]

111. Parās'ara, Chapter I, p. 6 (B. S. Series).
112. Parās'aramādhavya, p. 8.
113. Chapter IV, p. 14.
114. Kane, History of Dharmas'āstra, Vol. I, p. 195.

CHAPTER VII

The late Smritis: Nārada, Brihaspati, Kātyāyana and others

1. Introduction

It has been most aptly said by Kane[1] that Nārada, Brihaspati and Kātyāyana form a triumvirate in the realm of the ancient Hindu Law and composition of the legal literature. Their age may be fixed between 400 A.D. and 700 A.D. in a tentative way. All these three jurists exhibited an excellent analytical insight and the most perfect acumen of elaborating and explaining the juristic principles and philosophy. Of these three, only the work of Nārada has been preserved in a complete form. The traditional relation between the Smritis of Manu and Nārada has been fully discussed by various competent authors including Bühler, Jolly and Kane. The ancient MS of Nārada from Nepal, dated 1407, contains two additional chapters on theft and ordeal. Dr. Jolly rejects the chapter on ordeal as unauthentic and includes the chapter on theft as an appendix of his translation of Nārada. But a minute examination of the 61 verses of the additional chapter on theft included in the appendix of Jolly's translation of Nārada and the last 15 verses of Nārada's 14th Title named heinous offences, will clearly show that the substance of the matters dealt with in both the cases is essentially the same. Theft had already been dealt with as a special kind of sāhasa.[2] There the difference between sāhasa and theft has been explained thus: in a case of sāhasa, the criminal act consists of a forcible attack, whereas in case of theft, it is done by fraud. There is no reason to reject the last portion of Nārada, XIV, referred to above, as unauthoritative. Moreover, the style and method of treatment of the additional chapter are not always strictly in keeping with those to be found in the whole body of Nārada Smriti. In view of these facts, the additional chapter on theft also is equally liable to be rejected like the chapter on ordeals.

Like a true jurist, Nārada begins his disquisition with the object and necessity of administration of justice; then he deals with certain preliminary principles of general application and ultimately proceeds with the discussion

1. History of Dharmas'āstra, Vol. I, p. 213.

2. Nārada, XIV, 12-17; in these verses not only the definition but also other connected principles and procedure regarding theft have been discussed. Thus when the thieves could not be caught and the stolen property could not be recovered, the king was to compensate the injured person out of his treasury.

of the different topics of law and procedure in the most scientific, systematic and precise way, indulging in more division and subdivision of the topics and law. This feature was much more pronounced in Brihaspati and Kātyāyana. Brihaspati, like Nārada, very closely follows Manu so much so that he has rightly been characterised by Kane as a Vārtika-kāra of Manu.[3] Almost a similar observation has been made by Dr. Jolly[4] who says "Brihaspati even when not expressly referring to Manu, presuposes throughout an acquaintance with his code and a very large portion of his Smriti is devoted to the interpretation of technical terms or to the elucidation or amplifications of the somewhat laconic enunciations of Manu." Nārada flourished clearly later than Yājñaralkya and much later than Manu. He followed the latter more closely and was sometimes more conservative than the former.[5] Though Nārada essentially follows Manu, still he differs from him in several important points. Nārada uses certain different nomenclatures; Manu only casually refers to two kinds of ordeals by water and fire, whereas Nārada enumerates and describes in details seven kinds of ordeals; Nārada allows Niyoga though Manu strongly condemns it; Nārada has 15 kinds of slaves in place of seven kinds of slaves given by Manu; Manu condemns gambling, but Nārada allows it under state control for the purpose of revenue and Nārada subdivides the 18 titles of law by Manu into 132 sub-titles. "Though acquainted with the code of Manu," says Dr. Jolly,[6] "the so-called Nārada was far from offering a mere slavish reproduction of its doctrines in his own work. The Nārada-Smriti agrees on many important points specially in the law of evidence with the Smriti of Yājñavalkya, Viṣṇu, Brihaspati, Kātyāyana and Vyāsa. It may be a little older[7] than the three last-named works which belong to the latest productions of the Smriti epoch of Hindu law, but its legal rules and judicial theories have a decidedly more advanced character than either Viṣṇu's or Yājñavalkya's."

2. Nārada

In his preface, Nārada refers to the original code of Manu which underwent at least three abridgements at the hands of Nārada himself, Mārkaṇḍeya and Sumati. He also refers to the different topics dealt with

3. History of Dharmas'āstra, Vol. 1, p. 207.
4. Introduction to Brihaspati, Sacred Book of the East, Vol. XXXIII, p. 273.
5. Cf. The main thesis of Jayaswal on Manu and Yājñavalkya, (Tagore law Lectures, Calcutta University, 1917).
6. Introduction to Nārada, Sacred Book of the East, Vol. XXXIII, pp. XVII.
7. The reference to the drama, Mṛcchakaṭikam and the term Dināra by Dr. Jolly cannot furnish any conclusive evidence about the date of Nārada.

by Manu and himself. In the introduction, again, Nārada discusses the general principles of legal procedure which was necessiated on account of the transgressions of mankind and its deviation from duty.[8] The king was appointed to decide disputes with the help of oral and documentary evidence. Law suits again might be with or without wager.[9] The stage when wager had to be laid was discussed by Asahāya, the famous commentator of Nārada, though he does not say anything as to who was to get the money of the wager.[10] The plaint necessarily plays a very important part, it being the earliest statement of the plaintiff's case. The different gradations of courts[11] have been referred to by Nārada—beginning from the Kula and ending with the king. According to him, a law suit had four feet, to wit, Dharma, Vyavahāra, Caritra and Rājājñā;[12] each has been explained by Nārada himself along with the explanation of the other aspects of legal procedure, such as, eight members, eighteen[13] topics and so on. The 18 topics were ultimately further subdivided into 132 branches in all. A charge against a man might be based on fact or suspicion.[14] The king should be very careful and scrupulous in deciding cases according to equity and good customs, as the path of determining the truth is by no means easy.[15] Adjudication should always be based on reasoning and if and when necessary, even the sacred texts should be allowed to be superseded by custom which is all powerful.[16] Except in case

8. This implies that originally, "the state of nature" was full of bliss and peace; during that blissful period there was no dispute and hence, there was no necessity of law.

9. Cf. Roman *Sacramentum*.

10. According to Richardson, (Dhammathat, pp. 73) in Burmese law, ten *per cent* of the money staked should be given to the judge and the pleader and the remainder to the successful party.

11. According to Dr. Jolly, Kula, S'reṇi and Jana were the three bodies of private arbitrations compared with the pancāyats of India. But strictly speaking, they were not private, as appeals could lie therefrom even to the king in the last resort; hence, the decisions of the tribunals would stand and remain legally binding until and unless reversed by higher appellate courts. (See Nārada, Introduction, 7).

12. Cf Kauṭilya's Arthas'āstra, Book III, Chapter I.

13. After the preface and the introduction, the actual topics of law have been discussed by Nārada under the 18 titles following Manu and Kauṭilya. Each of these titles again has been futher subdivided. The divisions and the subdivisions have been fully explained and illustrated by the commentater Asahāya.

14. This has been very fully and clearly explained by Asahāya who further holds that a case based on mere suspicion should be decided with reference to ordeals which, however, should never be applied to cases where there is clear and sufficient evidence. Hence, the scope of applying ordeals was much limited. (See ante, Chapter I).

15. The analogy between finding out the truth in a dispute and the tracing of a wounded deer has been fully drawn by Asahāya, (Cf. Manu, VIII, 44).

16. Cf. The story of Māṇḍavya, Vas'iṣṭha, XVI 4; Gautama, XI, 23.

of debt and other subjects, the defendant shall submit his written statement without unreasonable delay ; ordinarily a man is not allowed to take law into his own hands ; but when the defendant tries to abscond at the time, when the case is going to be heard, the plaintiff may forcibly arrest the defendant to bring him before the court ; cross-suit[17] was not allowed and the principle of *res judicata*[18] was recognised even in ancient India. Nārada has enumerated the duties and the criteria of the veracity of the parties.[19] Any judge or assessor giving an unjust decision on account of negligence, wrath, ignorance or covetousness must be punished[20] by the king and should be declared unfit for announcing any judgment. The king should be very careful and vigilant, so that truth can be ascertained after avoidance of errors and mistakes. A true estimate of a witness also cannot be made only by looking at his appearance, as liars may easily have the appearance of veracious men and *vice versa*.[21] A king strictly performing his duties is sure to be rewarded[22] both in this world and in the next. Nārada deals with plaint in all its aspects in greater details in a fresh section.[23] The plaintiff or claimant shall cause the plaint to be written having produced the pledge of ascertainable value.[24] The answer or the written statement[25] assumes

17. Even according to modern principles of jurisprudence, sometimes countersuits are adjourned till the decision of the original suit ; sometimes they are tried together. The guiding principle in these cases is to simplify and expedite rather than complicate and delay. Cf. Asahāya and Yajñavalkya, II, 9.

18. As rain is useless for ripe grain, so also is evidence regarding a case already decided; but in exceptional cases, when a case has been decided, fresh evidence could be adduced and new witnesses examined provided they were announced at earlier stages indicating the bonafide and diligence of the party, (Cf. Asahāya, II, 20).

19. See Nārada, Introduction, 56-61 ; comments of Asahāya.

20. This was a very effective and wholesome check on the wanton exercise of judicial powers by the judges and the assessors, (Nārada, Introduction, 67 and Asahāya).

21. This has been explained with reference to certain similes and analogies, (See also Asahāya).

22. The reverse also is true. If a king punishes a man who does not deserve to be punished and does not punish a man who should be punished, he is doomed to go to hell and is sure to face a great calamity.

23. Nārada divides his introduction into three sections ; the first section deals with legal procedure, the second with plaint and the third with courts of justice Some of the points of sections II and III also have been discussed threadbare in section I.

24. The pledge perhaps refers to the wager. The meaning of Asahāya also is not sufficiently clear on this point.

25. The plaintiff can change his plaint in any way before the answer is given by the defendant ; but he is not at liberty to do so after the submission of the written statement (Cf. Nārada, Introduction, II, 24 and Asahāya).

four different forms, to wit, denial, confession, special pleas and *res judicata* each of which again admits of further subdivision. He has also referred to the seven defects of the plaints which are known as Paroktadoṣa.[26] A plaint even though otherwise correct is invalid, if it is contrary to the law and usage of the country. According to Nārada[27] whenever a man makes any significant statement in course of the trial on account of any passion or immoral motive, that statement should at once be reduced to writing[28] by the scribe. "This rule," says Dr. Jolly, quite appropriately, "seems to relate to incidental statements which escape one of the parties through inadvertency. Thus in the well known drama, Mṛcchakaṭikam, the wicked prince, Saṃsthānaka when informing the judge that Vasantasenā has been murdered adds "not by myself." The judge pounces upon the later statement suspicious as it looks and causes the scribe to put it down in writing on the floor. The prince perceiving that he has committed himself, effaces the writing with his foot. The custom of writing the statements of the parties on the floor is repeatedly referred to in Indian dramas. From what Brihaspati says, it would seem that in the time of this law-writer, the statement of the parties had first to be written on a board and then on a leaf after all the required corrections had been entered."[29] In referring again to the twofold division of evidence, namely, human and divine, Nārada clearly enjoins that the latter shall apply, when human evidence is not available. As regards burden of proof, generally the onus lies on the claimant; but when the defendant takes recourse to a special plea, the burden of proving the special plea shall be on him. Naturally, when the onus could not be discharged by a party, it was to lose the suit.[30] A Śūdra professing a false occupation against the member of a twice-born class[31] shall have his tongue slit by the king or his officers and shall be put on stakes. Nārada also makes a significant reference by saying that a man who institutes a suit in regard to

26. Kauṭilya's Arthas'astra, Book III, Chapter I.

27. Introduction II, 19-20.

28. Asahāya's commentary on Nārada; Burnell, South Indian Palaegraphy, 2nd Ed. p. 87.

29. Sacred Book of the East, Vol XXXIII, pp. 27-28.

30. Nārada refers to four classes of persons who shall be deemed in law to lose their suits. They are : (1) a man who takes to flight after having received the summons ; (2) a man who remains silent without saying anything to demolish the opponent's case or establish his own case ; (3) a man who is convicted of untruthfulness and lastly, (4) a man who makes a confession. These are called the 4 "abasannas," (Cf. Manu, VIII, 55-58 ; Yājñavalkya, II, 16 ; and Asahāya).

31. The effect of caste system was to be seen in Nārada also ; there was hardly any indication of its abatement in anyway.

a royal edict,[32] a document, a written title, a grant, a pledge in writing, a sale and a purchase is known as the defendant.[33] No judgment can be revised in appeal or revision when the defect in the case has been the result of his own conduct or confusion. The king shall see that persons convicted by the judges are duly punished and decrees executed.[34] The plaint has been rightly characterised as the mouth of a law-suit.[35]

3. The court of justice

While inside the courts of justice, no one shall speak without being duly authorised for[36] the purpose. An unauthorised person can speak only when he can point out the true provision of law which is not otherwise clear to or going to be administered by the judge and the assessors. It is incumbent on every person to see that no injustice should be allowed to be done when it is clearly against the provision of law and equity. Injustice gives rise to sins which are apportioned between the king, the members of the court, the witnesses and the accused persons. Hence, the administration of justice is a heavy responsibility; it is for these reasons that the judge shall be highly competent and vastly learned. When justice is slain by injustice and truth by falsehood, the members of the court, who look on with indifference, are doomed to destruction. A man delivering a strange opinion in the courts of justice is like a man who eats fish along with the bones.[37] Justice is deemed to be done when all the aggregate members of the judicial assembly are absolutely convinced that the truth has been fully ascertained and justice has been clearly administered. Nārada makes a very emphatic assertion regarding the administration of justice by saying: that is not a judicial assembly where there are no elders;[38] they are not

32. The different expressions have been fully explained by Asahāya. (See his comments on Nārada, Introduction, II, 38).

33. In all the cases, referred to above, the claimant was regarded as the defendant perhaps on account of the fact that there was a *prima facie* presumption against the opposite party on which lay the burden of proof.

34. The king was the executive as well as the judicial head.

35. Cf. Asahāya who understands the general procedure as the mouth of the law-suit.

36. The authorised persons include judges, assessors and the experts who know the law. It is doubtful if there was any regular legal profession in ancient India. Things might have been otherwise in Burma. The assertion of Jayaswal on this point is open to criticism. Legal opinion, of course, could be given by those who were supposed to be experts on the subject. Their learning implied a special responsibility even without any specific authorisation or engagement. (Cf. Asahāya).

37. The simile has been taken from the condition of a false witness. (Cf. Asahaya).

38. According to Dr. Jolly, this assertion does not quite fit in with Narada's own ideas regarding the constitution and position of the judicial assembly. This might refer to the wise and experienced judges or the local arbitrators or Grāmabriddhas. (Sacred Book of the East, Vol XXXIII, P. 40.

elders who do not pass a just sentence ; that is not a just sentence at all in which there is no truth and that is not truth which is vitiated by errors.

4. Topics of law

After the preface and the introduction, Nārada deals one by one with the 18 different topics of law, mainly based on Kauṭilya and Manu and also essentially accepted by Yājñavalkya. The first title deals with the law of debt; but in this connection many other topics also have been discussed. The most important of these extraneous subjects are regarding property, adverse possesion, witnesses and evidence including ordeals. The divisions and subdivisions are sometimes cumbrous and often too numerous.[39] Another general characteristic of Nārada is that his writing is more explanatory than mere declaratory.[40] Sometimes many topics are introduced in the discussion which could very well have been omitted[41] from this book which is strictly legal, unlike the mixed codes of Manu, Yājñavalkya and the foregoing Sūtra-writers. Nārada discusses the theory of debts from all the three standpoints, to wit, religious, moral and legal. If an ascetic or an Agnihotri dies without paying his debts, all his religious merit will go to the creditors. In case a Brahmin creditor dies, the debtor shall pay the debt to his heirs, in absence of the heirs, to his distant relations and in their absence, to other Brahmins and on failure of all these, the money should be thrown into waters—an act which will absolve the debtor from his liability. Again according to Nārada, the liability of repaying debts does not involve the fourth in descent. As an actual illustration of this point, Asahāya refers to the case of Śrīdhara and Mahīdhara[42] which, however, included even the great-grand-son in the list

39. The discussion on property is an instance in point. (Cf. Gautama, X. 27, 49, 56 ; Āpastamba, I, 1, 1, 5-5 ; Baudhāyana, I, 18, 1-5 ; Vasiṣṭha, II, 13-20 ; Viṣṇu, II. 4-14 ; Manu, 1. 88-89; X, 74-80 and Yajñavalkya, II, 118-120).

40. Nārada describes 7 kinds of ordeals in details—much more fully than Yajñavalkya. Manu simply referred to two kinds of ordeals without giving any details. Nārada devotes 88 verses in describing the seven different kinds of ordeals (Nārada, 1. 260-348).

41. In 1, 56-67, Nārada deals with the occupations of the different castes, specially of the Brahmins in times of distress. The subject matter is purely social and not legal ; but as caste system was one of the main props of the society, everybody was desired to remain within the orbit of his own caste on pain of punishment by the king (Cf. Gautama, VII, 6, 7, 8-20 ; Āpastamba, I, 7, 20, 11 ; Baudhāyana, II, 4, 16 ; Manu, X, 81-90 ; Yājñavalkya, III, 35-39).

42. For details, see PP. 43-44 of Vol. XXXIII of the Sacred Book of the East. The observations of Asahāya have been questioned by Dr. Jolly, on the ground that the present principle was not to be found in any other works on civil law. Hence, Jolly was led to think that the insertion and the interpretation of the passage in question were for supporting the personal view of the commentator himself. But in view of the many new principles enunciated by Nārada, this suspicion on the part of Dr. Jolly, might not be based on sufficient grounds,

of persons liable. This case according to Dr. Jolly "presents a vivid picture of the way in which judicial proceedings used to be transacted in ancient India." The liability for debts goes together with the rights of succession. A father need not pay the debt contracted by the son and the husband also need not pay the debt incurred by the wife except in case of extreme necessity[43] when the actual debtors could be regarded to have taken the loan as agents, express or implied[44] or when the money of the loan was used for the necessity or benefit of the family. An heir was clearly exempted from paying the immoral debts of his ancestor. The wife also must not pay the debt contracted by her husband, nor one contracted by her son except if it had been promised by her or contracted along with her husband. This rule, however, does not apply in case of wives of washermen, huntsmen, cowherds and distillers of spirituous liquor, as these women have independent sources of their income.[45] Women,[46] slaves and sons[47] cannot incur any debt except as agents of their husbands, masters and fathers. Nārada enumerates three important modes of proof, namely, document, witness and possession. Certain relative advantages of documentary evidence has been enumerated by Nārada and elucidated by Asahāya.[48] Possession is the most important mode of proof. In spite of documentary title, a property can be lost by adverse possession[49] which, of course, does not apply to pledge, boundary, the property of the minor, an open deposit, an *upanidhi* deposit, woman and the property of the king[50] or a learned Brahmin. As title without possession is defective, so also is the case with possession without title.[51] In cases falling within the memory of man, possession with title creates unassailable ownership, but in cases extending beyond the memory of man and failure of documents, the hereditary succe-

43. Nārada, I, 18 ; Yājñavalkya, II, 48 ; Viṣṇu, VI, 32-37.

44. Nārada, I. 11, 30.

45. *Ibid*, I, 19.

46. Women were, of course, competent to enter into transactions regarding their strīdhana property excepting immovable property. (Nārada, I, 28).

47. Sons attain majority after the completion of the 15th year. (Nārada, I, 35). Though there is a difference of opinion as to whether majority is attained at the beginning or the end of the 16th year, still the above view has been accepted by most of the authorities. (Dr. Jolly, Sacred Book of the East, Vol. XXXIII, P. 51).

48. *Ibid*, P. 59; (Cf. Vaśiṣṭha, XVI, 10, Viṣṇu, VI, 23; Yājñavalkya, II, 22).

49. For the different theories on adverse possession, see ante, Chapter I.

50. According to Asahāya, king's property means land, this interpretation has been rightly questioned by Dr. Jolly. Property actually means any species of movable or immovable property. (Cf. Nārada, I, 81-83; Dr. Jolly, Sacred Book of the East, Vol. XXXIII, P. 62).

51. Nārada, I, 83, 89.

ssion of three ancestors have the same effect.[52] In all transactions involving debts or any subject matter of the 18 titles of law, the last act is decisive, whereas in case of gift, pledge or purchase, the first acts settle the matter.[53] Lending money at interest is permissible for some for making living by it. Nārada[54] also refers to the rate of interest (15 *per cent per annum*) as having been enunciated by Vaśiṣṭha. Interest has been declared as four-fold : Periodical, stipulated, kāyika and compound.[55] Damdupat and other principles are recognised in different localities according to special customs and usages.[56] It is incumbent on the creditor to give receipt to the debtor when the latter makes any payment, on pain of losing the balance of the sum due.[57] A surety and a pledge are the two sorts of guarantees for the repayment of loans on interest. A surety may be for three different purposes, namely, for appearance, for honesty and for payment. When there are more than one surety, their liability is joint and several. A creditor shall be allowed to take recourse to any of the four or five different modes[58] for the realisation of the money advanced both for religious and secular reasons. A pledge also may be of two different kinds—for security and for enjoyment. The pledgee is not responsible for the injury to or loss of any pledge, if they are caused by Act of God or king without any fault on the part of the creditor. If a rich debtor, out of malice, refuses or neglects to repay the loan, the king should compel him to pay the loan by force and shall take 5 *per cent* from him.[59] The importance of document as a mode of proof has been rightly emphasised by Nārada according to whom if the creator had not created writing as an excellent eye, as it were, the affairs of the whole world would not take their proper course.[60] A document may be in the writing of the executant himself or somebody else. No document is valid, if executed by a man intoxicated, by a woman, a minor, or a person under duress, coercion or undue influence.[61] A peculiar

52. *Ibid*, I, 89-91; see also the comments of Asahāya thereon. For the meaning of the expression "memory of man" see Dr. Jolly, Sacred Book of the East, Vol. XXXIII. P. 62-63.

53. For explanation, see Asahāya; Cf. Yājñavalkya, II, 23.

54. II, 51.

55. Manu, VIII, 153; Gautama, XII, 34-35.

56. Manu, VIII. 151; Viṣṇu, VI- 11-17; Yājñavalkya, II, 39; Gautama, XII, 36.

57. Nārada, I, 114; Cf. Yajñavalkya, II, 93 ; Viṣṇu, VI. 26.

58. For elucidation, see the commentary of Asahāya, Cf. Manu, VIII, 49; "Ācarita" has been explained as sitting Dharnā—an institution which was also found in Brebon Laws of ancient Ireland (see Early History of Institutions, by Sir Henry Maine, P. 297 et seq.)

59. The provision was compensatory as well as penal. Cf. Manu, VIII, 139; Yājñavalkya II, 42, Viṣṇu, VI, 21.

60. Nārada, I, 70; Vas'iṣtha, XVI, 10; Viṣṇu, VI, 23; Yājñavalkya, II, 22.

61. Viṣṇu, VII, 6-10; Yājñavalkya, II, 89.

provision was made by Nārada, for presuming the validity of a document, by showing it or reading it out to the debtor or his descendants repeatedly.[62] A document can be annuled by another document;[63] a writing is superior to a witness and not *vice versa*.[64] Generally speaking, evidence should be direct,[65] that is, a witness must have witnessed a transaction with his own eyes or ears. There are eleven kinds of witnesses, five of whom are appointed and the rest of whom are not appointed.[66] The number of witnessess must not be less than three and they shall be reliable, of good descent, truthful, solvent and belonging generally to the twice-born classes.[67] By consent of the parties, of course, one witness also may prove the case (Nārada, I, 192). Nārada also refers to the five classes of incompetent witnesses on account of the provision of the text of law : depravity, want of veracity, uncalled for deposition and intervening disease.[68] When the plaint is weaker[69] than the written statement, the witnesses of the defendant should be examined first.

5. Evidence : circumstancial and otherwise

Nārada refers for the first time to circumstantial evidence where no witnesses are necessary. He has enunciated certain circumstances[70] which speak for themselves; but strictly speaking, in most of the cases the criterion[71] insisted on by the modern courts of justice for establishing guilt

62. Nārada, I, 140 and the commentary of Asahāya thereon.

63. If any doubt arises regarding the validity or authenticity of a document, its genuineness has got to be examined by a comparison of the handwriting of the party, the tenor of the document, peculiar marks, circumstantial evidence and the probabilities or improbabilities of the case. (Nārada, I, 143).

64. Oral evidence could not affect or vary documentary evidence.

65. Manu, VIII, 74; Viṣṇu, VIII, 13.

66. The different classes of witnesses have been fully explained by Asahāya.

67. Twice-born people are generally preferred as witnesses. But in exceptional cases of crimes only, the S'ūdras also might be examined as witnesses. The S'ūdras, however, to be witnesses must be irreproachable; no such condition is imposed on the twice-born classes. (Cf. Manu, VIII, 62, Gautama, XII, 3 ; Baudhāyana, I 19; 13 ; Vas'iṣṭha, XVI, 29 ; Yājñavalkya, II, 69).

68. Nārada, I 157-171.

69. Yājñavalkya, II, 17; Viṣṇu, VIII, II.

70. One carrying fire brand in his hand is an incendiary; one taken with a weapon in his hand is a murderer, when a man and the wife of another man seize one another by hair, the former is an adulterer; one who goes about with a hatchet in his hand towards a bridge. may be treated as a destroyer of the bridges etc. (Nārada, I, 172-75).

71. "In order to justify an inference of guilt, the circumstances from which such an inference of guilt is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt" 35 C. W. N. 169.

beyond reasonable doubt is not satisfied. Nārada himself seems to be conscious of it.[72] A man who is interested in the suit, a friend, an associate, an enemy, a notorious offender, a person tainted with heinous crime, an atheist and a Vrātya cannot be regarded as reliable witnesses.[73] The symptoms of false witnesses also have been very realistically described by Nārada.[74] The provisions for exhorting witnesses of the different castes are also to be found in the Dharmasūtras.[75] A false witness is sure to be fettered with a thousand bonds from the chain of Varuṇa.[76] Different numbers of kinsmen are killed by a false witness according to the character of the thing or the person in respect of which the false evidence is given. In case of conflict of evidence, the matter should be decided by majority or superiority of caste or memory.[77] Whenever a party is given up or betrayed by its own witness[78] it cannot be absolved even by ordeals. In absence of documents and witnesses, the methods used in general and for the realisation of debts in particular, for establishing one's claim are three-fold :[79] argument, reminder and ordeal. The last one is applicable only when both the parties are agreeable and when the plaintiff declares himself ready to take the punishment on himself in case of defeat.[80] The details of the different

72. The doctrine of circumstantial evidence is based on certain indications from which the inference of guilt has got to be drawn; but these indications are not always unmistakable. Some, for instance, might make marks upon their own body with a view to injuring their adversaries. In actual occurrences, sometimes parents and children also are hurt or even murdered for trapping enemies. Special care is, therefore, needed in a case of circumstantial evidence. (Nārada, I. 172, 176).

73. Narada, I, 177-87, Gautama, XIII, 5; Viṣṇu, VIII, 1-5; Manu, VIII, 64-67; 71; Yājñavalkya, II, 70. 71.

74. See ante, Chapter I; Cf. Viṣṇu, VIII, 18; Manu, VIII, *26*, 26, Yajñavalkya, II, 13-15.

75. Gautama, XIII, 12-23; Āpastamba, II, 11,29, 7-10; Baudhāyana, I, 10. 12, 19, Vas'iṣṭha, XVI, 32-34; Manu, VIII, 79-'01, Yājñavalkya, II, 73-75.

76. Varuṇa's punishment was supposed to have been reserved for every crime and criminal (see ante, Chapter II).

77. Viṣṇu, VIII, 39; Manu, VIII, 73; Yājñavalkya, II, 78.

78. According to modern law of evidence, such a witness may be declared hostile and then cross-examined with the permission of the court: no such method could be possible, when there was no sufficient provision for cross-examination in the modern sense of the term. This is also perhaps an indication that there was no regular legal profession in ancient India, (Nārada, I, 231).

79. These methods have been fully explained by Asahāya though his explanation of reminder is not wholly correct. (*Ibid*, I, 235-39).

80. See Asahāya on Nārada, I, 257; this was undoubtedly a very wholesome check on the application of ordeals; this would go a long way to mitigate the rigour of ordeals even though there might not be sufficient protection against the accused person in the form of presumption of innocence in the modern sense of the term. For the human elements in ordeals see ante, Chapter I; Cf. Nārada, I, 255, 313.

kinds of ordeals have been provided for by Nārada in a much more exhaustive[81] way than any of the preceeding jurists. In case of ordeals by balance, should the scales break or the beam or the hook split or the strings burst or the transverse beam split, the judge shall pronounce a formal declaration of his innocence.[82] In case of ordeals by fire, if it does not appear whether the hands of the accused person are burnt, he shall take and seven times crush grains of rice in his hand with all his might.[83] This ordeal by sacred libation was to be applied to those only who believed in God. This was perhaps true of all the ordeals at least in spirit.[84]

6. Deposits

Nārada's second title of law deals with deposits which must invariably be made with persons of respectable family and those who are virtuous, dutiful, veracious, wealthy and honourable, as these transactions are absolutely based on confidence.[85] The return or re-delivery must take place in the very manner[86] of deposit. The depositary shall generally be liable for the loss of or damage to the deposits.[87] Trustees as they are, the depositaries shall not make any profit out of the trusts and shall be accountable for the profit, if any.[88] The entire law of partnership including its definition[89] and the mutual rights and duties[90] of the different members, as dealt with by Nārada in the third title, seems to be quite modern. By way

81. See ante, Chapter VI, 5.

82. Brihaspati holds a different view : The accidents referred to above will indicate the guilt of the accused person. According to Kātyāyana, Vyāsa and Viṣṇu, however, the proceedings should be repeated.

83. This was a sort of additional ordeal. This process itself could cause some wound in the hands.

84. Ordeals are after all based on the belief of appeal to the religious sentiment. Hence, the drinking of consecrated water was to be avoided in case of great criminals, irreligious persons, Vrātyas and unbelievers. (Cf. Nārada I, 388, 332).

85 Asahāya rightly remarks that a man should not deposit even a single cowry with a man, in whom he has no confidence; on the contrary, even suvarṇas can be deposited with a reliable man without receipt or witness. (Manu, VIII, 179).

86. As for example, the sealed cover should be returned with the seals in tact; deposits made in presence of witnesses must be returned in presence of witnesses. This is a wholesome principle from the standpoint of the depositary's immunity also. (Cf. Nārada, II. 13; Manu, VIII, 180, 183).

87. Cf. Kauṭilya, Book III, Chapter XII, Nārada, II, 9, 12, Manu, VIII, 189.

88. According to Asahāya, a depositary making any profit out of the deposit shall not only make over the gain with the interest but also he shall be punished by the king. (Cf. Yājñavalkya, II, 67).

89. The main object or purpose of partnership is gain or profit (Nārada, II, 2).

90. The profit and the loss are to be apportioned among the partners according to their shares subscribed. (Cf. Manu, VIII, 211, Yājñavalkya, II, 259).

of special encouragement it has been provided for by Nārada that where the property of the partnership was in danger through fate or any other reasons, the tenth part of the goods shall belong to him (in addition) who has preserved them through his own special exertion.[91] The principle of partnership is also usually applicable to the priests who jointly undertake to perform a sacrifice.[92] The last seven verses of this title dealing with tolls and taxes seem to be quite unconnected with the topic of partnership and as such they might have been interpolated here.

7. Gifts

In his fourth title, Nārada deals with resumption of gifts and in this connection he enumerates the seven different kinds of valid gifts and the sixteen different kinds of invalid gifts.[93] The most important condition of a valid gift is that what is left after the expenses of maintaining the family have been defrayed may be given; giving away anything more than this is to be morally censured.[94] Breach of contract of service has been dealt with by Nārada in the fifth title. The term service has been used in a wider sense to include even the conducts of students,[95] apprentices[96] and slaves. The relation between the preceptor and the student is concerned more with the first stage of an Ārya's life (Brahmacarya) than with any topic of law.[97] Slavery again is an institution having its own legal significance. Service might be of two kinds—pure and impure. The latter was reserved for the slaves,[98] whereas the former was meant for other labourers. Strictly speaking, hired servants implied the course of employment subsisting between a master and a servant in the modern sense of the terms. These hired servants might be of three different classes.[99] It is also doubtful how far a Kauṭumbika[100] could be regarded as a

91. The principle enunciated herein is analogous to the provi ion giving an additional share to the member of the family who regains by his own efforts some property lost thereto.

92. Similar illustrations are to be fouud in Kauṭilya also (Book III, Chapter XIV).

93. Asahāya has explained and illustrated them all; (Cf. Manu, VIII, 212).

94. Nārada, IV, 4-6 ; Yājñavalkya, II, 175.

95. For rules of conduct of students, see Nārada, V, 9-15; Gautama, II, 42-44, Āpastamba, I, 28, 29, 31; Manu, VIII, 299-300.

96. Cf. Nārada, V, 16-21.

97. The Varṇa and Ās'rama are the two most important and fundamental conceptions of ancient Hindu law and society. They had become less important in the hands of Nārada ; but still he could not absolutely get rid of them.

98. Slaves could be of 15 different kinds all of which have been enumerated by Nārada and explained and illustrated by the Mitākṣarā, pp. 268 ; Nārada, V, 26-28 ; Manu, VIII, 415.

99. The soldiers constituted the highest class, the agriculturists the middle and the porters the lowest class. (Nārada, V, 22-23).

100. Nārada, V, 24 ; Vīramitrodaya, p. 405.

real servant. The legal character of all the slaves was not again the same. The bondage of the first four kinds of slaves enumerated by Nārada was permanent and they could be released only by the favour of their masters. The rest of the slaves were under a bondage which was more or less temporary and conditional and hence terminable according to the very terms and conditions.[101] In the sixth title, Nārada deals with the non-payment of wages of the labourers in general and carriers, cowherds and courtesans in particular. As a general rule, the employer shall regularly pay the wages according to the terms and conditions, agreed upon by the parties. The major portion of the title is devoted to the mutual rights and duties existing between the owners of cattle and the cowherds.[102] Towards the close of the title there is a verse which refers to the rights and liabilities of a so-called tenant who builds a house on the land of another with his own materials.[103] In the last verse there is a reference to the proper payment and return of the hired commodities.[104] These two matters are clearly beyond the scope of non-payment of wages—unless the term wages has been used in a much wider sense to include any due on any account.

8. Sales without ownership

The seventh title of Nārada is a small one consisting of only eight verses concerning sales by persons other than the real owners. Clandestine sales, as contrasted with open sales, make both the vendors and the vendees equally liable for theft of the things concerned.[105] When any such unauthorised or illegal sales are detected, the vendors shall restore the property to the rightful owner and shall pay to the buyer the price for which it was sold to him ; moreover, they shall pay a fine to the king. The purchaser can be absolved from liability only when he can offer a satisfactory explanation as to how he came by the property. In the last two verses but one, Nārada refers to the rights and duties of the finder of a treasure

101. Should any slave save his master's life when it is in peril, he shall be released from slavery and be entitled to a son's share ; (Nārada, V, 30). Again a debtor slave could be released by payment of the debt ; (*Ibid*, V, 33). Proprietory rights were denied to the slaves by Nārada like Manu ; (Manu, VIII, 416).

102. Nārada, IV, 10-17 ; Manu, VIII, 231-35 ; Yājñavalkya, II 164.

103. Nārada, VI, 20-21 ; for the comments on the latter verse, see Jolly, Sacred Book of the East, Vol. XXXIII, p. 143.

104. The different commentators refer to different commodities lent on hire ; in a sense all of them may claim to be right, as there is nothing in the text to restrict the hired commodity to any particular species of property ; *Ibid* , p. 144.

105. The whole of the subject-matter has been very nicely summarised by Dr. Jolly, Sacred Book of the East, Vol. XXXIII, p. 145.

trove.[106] The most singnificant provision has been made in the last verse according to which, of his own property also, which he had lost and found again afterwards, a man must give notice to the king ; otherwise the property is not his legal property. This implies a very fine conception of theft no doubt. The eighth title of Narada deals with the non-delivery of a sold property. When a man sells a property for a fixed price and does not make over the same to the purchaser, he shall remain liable for the injury or damage to or loss of the property and accountable for the profit accruing to the property after the sale until the time of delivery. In other words, the seller under these circumstances placed himself in the position of a constructive trustee.[107] Exactly similar is the modern conception of the law on this point. When the seller shows one thing and actually makes over another thing to the purchaser and when a seller first of all sells one thing to one man and delivers it to another, he will be liable to pay compensation as well as fine.[108] Nārada refers to the sixfold mode of purchase and sale by means of weight, measures etc. But this classification is quite insignificant from the legal point of view.[109] Rescission of purchase has been treated by Nārada in the 9th title. The general rule on the point is that whenever the purchaser wants to rescind the sale, he must return the article undamaged and unsoiled with as little delay as possible. One of the most fundamental principles enunciated by Nārada is that when the article was purchased after thorough examination by the purchaser, it could not be returned at all. This is identical with the modern doctrine of *caveat emptor*.[110] Nārada has imposed different conditions as to during what time and subject to what loss,[111] the articles could be returned. The different rules and conventions established by the heretics, the followers of the Vedas, the guilds of merchants, corporations, troops of soldiers, assemblages of kinsmen and other associations[112] must be recognised and maintained by the king who must punish all transgressions and see that no act contemptible in nature or against morality or public policy can be done by any of these bodies.

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106. Nārada, VII, 6-8 ; Gautama, X, 36-38 ; Vasiṣṭha, III, 13-14 ; XVI, 19-20 ; Viṣṇu, V, 56-64 ; Manu, VIII, 30-39 ; Yājñavalkya, II, 33-35.

107. Nārada, VIII, 4-6 ; Vivādacintāmani, p. 55 ; Vīramitrodaya, p. 437; Colebrooke's Digest, III, 27.

108. Yājñavalkya, II, 254-57 ; Viṣṇu, V, 127-129.

109. Vīramitrodaya, p. 437 ; Ratnākara, as quoted in Colebrooke's Digest, III, 3, 3.

110. Nārada, IX. 4.

111. *Ibid*, IX, 5-15 ; Manu, VIII, 222, 397 ; Yājñavalkya, II, 177-180 ; Mitākṣarā, pp. 265-266.

112. For discussion on this topic, see Gautama, XII, 20-26.

9. **Boundary disputes**

The eleventh title of Nārada professes to deal with boundary disputes; but as a matter of fact, more than one-third of the title is devoted to the exposition of the rules and regulations concerning cattle-trespass. From this Dr. Jolly rightly concludes that the term "boundary disputes" is used in a wider sense and practically it includes all disputes relating to field.[113] In all possible cases of boundry disputes of lands, tanks, lakes etc. on the one hand and villages on the other, the opinions of neighbours and other members of the community should be taken into consideration laying emphasis on the opinions of the elderly people. The king has the ultimate responsibility and authority to demarcate at his discretion lands and villages in absence of any other reliable evidence.[114] Ordinarily one man's opinion should not be taken as decisive for adjudicating boundary disputes. Nārada also insists on local inspection.[115] The twelveth title in the Nārada-Smriti deals with the mutual rights and duties of husbands and wives and in this connection it deals with the institution of marriage, its different forms, impotency, adultery, incest, levirate, divorce, separation, re-marriage, mixed castes and the different classes of "punarbhus" and "svairiṇis." Regarding most of these topics Nārada essentially follows the provisions made by his predecessors including the authors of the Dharmasūtras. In some respects, of course, he agrees to differ from them and makes his own provisions. Regarding marriage, he speaks of two distinct stages—the betrothal and the actual ceremony of the marriage, the former being dissoluble on the discovery of a blemish and the latter being conclusive and indissoluble after the completion of the actual ceremony of marriage accompanied by the utterances of the mantras[116] and the observance of certain ceremonies. He also refers to the prohibited degrees in marriage and inter-caste marriage.[117] Nārada refers to fourteen kinds of impotent men with their characteristics and insistt on examination with regards to the virility of the bridegroom. But this insistence is not to be found in other sage-legislators perhaps in view of the institution of appointment which is also recognised by Nārada. Provision also has been made for second

113. Sacred Book of the East, Vol. XXXIII, p. 160.

114. Manu, VIII, 238-259 ; Yājñavalkya, II, 150-163.

115. Nārada, XI, 6.

116. Manu, VIII, 227.

117. Nārada recommends marriage between Brahmin males and S'ūdra females, though he prefers marriage between the selfsame castes, Cf. Baudhāyana, I, 8, 16, 5 ; Manu and others are against such marriages.

marriage of women under certain conditions[118] as women were created for the purpose of propagation. In absence of a guardian, a girl could get herself married of her own initiative.[119] Child marriage was eulogised.[120] Nārada refers to the system of appointment, but he does not refer to the controversy regarding the ownership of such a son. He has enumerated the different circumstances giving rise to the offence of adultery.[121] The different mixed castes have been discussed by several verses.[121a]

10. Inheritance, partition and strīdhana.

In the thirteenth title, Nārada deals with inheritance including the rules of partition, strīdhana[122], gains of learning[123], the guiding principle for sons to be entrusted with the management of the family,[124] exclusion from inheritance,[125] presumption of separation,[126] the different kinds of sons,[127] their order of superiority and the order of succession among the different kinds of heirs.[128] Partition can take place according to Nārada either after the death of the father or when he is too old or even during his lifetime according to his own will.[129]

118. Nārada, XII, 16, 97. The latter verse is identical with a verse of Parās'ara. See also Vasiṣṭha, XVII, 74.

119. This has been wrongly illustrated as a "Svayaṃvara" form of marriage by Dr. Jolly. Though literally so, a svayaṃvara form of marriage has got its own significance and it is never dependent on the presence or absence of guardian.

120. Gautama, XVIII, 22 ; Vasiṣṭha, XVII, 71 ; Baudhāyana, IV, 1, 13.

121. For incest on a Pravrajitā see Dr. Jolly, Sacred Book of the East, Vol. XXXIII, p. 180.

121a. Cf. Manu, X, 6-41 ; Gautama, IV, 16-28 , Baudhāyana, I, 16, 6-12, 17 ; Viṣṇu, XVI, 17 ; Yājñavalkya, I, 91-95.

122. Nārada, XIII ; Viṣṇu, XVII, 18 ; Manu, IX, 194 ; Yājñavalkya, II, 143-44.

123. According to Nārada when one brother maintains the family of another brother who is engaged in the study of science, he shall be entitled to a share of the gains. This is quite reasonable, as in this case, even the unlearned brother indirectly contributed to the acquisitions of the gains by the learned brother.

124. Priority or otherwise of birth was no consideration ; ability was the chief criterion ; (Nārada, XIII, 5).

125. *Ibid*, XIII, 21-22 ; Gautama, XXVIII, 23, 40, 43 ; Āpastamba, II, 6, 14, 1, 15 ; Baudhāyana, II, 3, 37-40 ; Vasiṣṭha, XVII, 52-53 ; Manu, II, 201-203 ; Yajñavalkya, II, 140-141.

126. It is a settled rule according to Nārada that the brothers who continue for ten years to live separately in religious and secular transactions shall be regarded as separate.

127. Nārada, XIII, 45-47 ; Baudhāyana, II, 2, 3, 14-32 ; Vasiṣṭha, XVII, 12-39 ; Viṣṇu XV, 1-29 ; Manu, IX, 158-184 ; Vājñavalkya, II, 128-130.

128. Nārada, XIII, 50-52 ; Gautama, XXVIII, 21 41-42 ; Āpastamba, II, 6, 14, 2-5 ; Vasiṣṭha, XVII, 81-84 ; Manu, IX, 185-189 ; Yājñavalkya, 1, 6, 14, 2-5.

129. All these are the most helpful hints even according to the modern principles of criminology and evidence.

11. Crimes

The 14th, 15th and the 17th titles in Nārada deal with crimes. The later the Smriti, the more systematic is the law of crimes and more exclusive is the treatment between civil law and criminal law. But the enunciation of the principles underlying the fundamental distinction between crimes and torts was reserved for Brihaspati. The 14th title discusses the heinous offences called sāhasa which consists of man-slaughter, robbery, an indecent attack on another man's wife and the two species of insult which again admits of three-fold classification based on the gradation of the offence. For a sāhasa of the highest degree, the punishments are fines not less than thousand paṇas, corporal punishment, confiscation of the entire property, banishment from the town, branding and amputation of the offending limbs, indiscriminately for peoples of all the castes excepting the Brahmins who are not to be subjected to corporal punishment and who are only to be banished being branded on the forehead with a mark indicating the crime committed. Theft is a special kind of sāhasa and admits of three-fold classification according to the value of the subject-matter of theft. Possession of stolen articles, luxurious mode of living, indulgence in extravagances and presence in the company of the wicked raise presumption of theft. Persons screening thieves and giving food and shelter to them are equally guilty as thieves. Those who do not come to the assistance of men crying for help in distress when their property is being stolen away, are also to be treated as accomplices of theft.[130] Detection of thieves and tracing of stolen articles imply an additional liability on the part of the people of the locality[131] concerned and the king himself.[132] The 15th and the 16th titles deal with insult and assault each of which may be of three different categories.[133] A superior man can himself punish a Svapāka, Meda, Caṇḍāla and other men of inferior classes.[134] The abuses and assaults among people of the selfsame caste as well as of different castes have been discussed in details by Nārada

130. Wherever the foot-marks of a thief go, the inhabitants or the owners of that place must make good the loss, unless they can satisfy that the foot-marks go out of that place again ; (Nārada, XIV, 23 ; Yājnavalkya, II, 271).

131. In case of failure to find out the thieves or recover the stolen properties, the king must make good the loss from his own treasury; (Nārada, XIV, 27 ; Yājñavalkya, II, 272).

132. Nārada, XV, 1-5 ; the sixth verse seems to be out of place ; it speaks of sāhasa and as such it ought to have been included in the preceding title. This verse also speaks of the extirpation of the sinners (Kaṇṭaka) implying an influence of Book IV, of Kauṭilya.)

133. Nārada, XV, 12-14 ; Vīrmitrodaya, p. 472.

134. Nārada, XV, 15-29 ; Mānu, VIII, 267-284.

essentially on the same line as Manu and Yājñavalkya.[135] The king and the Brahmins have been declared as entitled to special protection against censure and corporal punishment as both of them are regarded as sustaining the whole world. A father is not liable for the offence of his sons and the owners of animals for the harm done by them unless they were sent by the owners to do the harm.[136] The 17th title in Nārada deals with games including gambling and betting which must be regulated by the state. Nārada[137] in this respect follows Kauṭilya and Yājñavalkya unlike Manu. Fraud and dishonesty must be checked and punished by the officers concerned[138] and the disputes regarding games must be determined according to the rules and conventions of the gambling houses.[139] The 18th cr the last title deals with miscellaneous topics.[140] Regarding the contents of this title the remarks of Dr. Jolly are very significant. According to him "the meagre contents of this title of law can hardly be said to be in keeping with the somewhat pompous announcement contained in paragraphs 1-4. On the whole this title of miscellaneous as defined by Nārada and Brihaspati may be described as treating of public law or the law of kings (Rājadharma), private law being treated in the seventeen orther titles of law." This remark is corroborated by the first verse itself of the title. But in view of the contents of verses 3, 4 and 5[141] of the title, it appears that the miscellaneous topics also include many religio-sociological topics besides some topics of public law as included within the political science. The position of the king and the Brahmins implying many privileges[142] have been no doubt extolled. Without them there would be confusion everywhere. The different castes would forget their duties and the greatest re-action would occur from the most oppressed Śūdras. The main function of the king has been referred to as judicial rather than legislative having the combined qualities of many

135. If a man censures a dutiful king or assaults even a wicked king, he shall have his tongue cut out, or his entire property confiscated or he shall be fastened on a stake and burnt by fire ; (Nārada, XV, 30-31).

136. *Ibid,* XV, 32.

137. Nārada, XVII ; Yājñavalkya, II, 199, 203.

138. Nārada, XVII, 4.

139. Sacred Book of the East, Vol. XXXIII, p. 214.

140. Among other things the third verse deals with penances, the fourth verse with confusion of castes and the 5th verse with the protection of the different orders of life. The importance of Varṇa and Ās'rama in the ancient Hindu society should be remembered in this connection.

141. Nārada, XVIII, 32-55.

142. Nārada, XVIII, 26-31.

gods.[143] The king only executes and never formulates laws except through adjudication.[144] This will be fully corroborated by verses 19, 22, 33 and 52 of this present title.

12. Brihaspati

The fragments of the Brihaspati-Smriti.[145] exhibit the latest and the most perfect specimen of juristic speculation and the most systematic and methodical treatment thereof. The entire work is divided into 27 chapters or sections of which the first two are devoted to the constitution of a court of justice and the general rules of procedure ; the next four are devoted to the treatment of the plaint, the answer, the trial and the judgment—the four stages of legal proceeding ; the next four are devoted to the different modes of evidence and the last seventeen are devoted to the treatment of the topics covered by the 18 titles of Manu, Yājñavalkya and Nārada.[146] Unlike Nārada, Brihaspati does not mix up the subject-matter of evidence in the midst of discussions of the law of debt. But he agrees with Nārada in saying that law was introduced on account of transgression.[147] Judicial assemblies are declared to be of four different classes—two being stationary and the other two not being stationary.[148] The legal procedure implies the presence of ten members including the judges and other officers[149] on the one hand and the essential things[150] on the other. The Chief Justice[151] was to be recruited from the twice-born classes. Brihaspati for the first time clearly distinguishes crimes and torts originating in wealth or injury—"Dhanahiṃsāsamodbhava." All violations of law except sāhasa[152] could be adjudicated by relatives, corporations and assemblies, duly authorised by the king. Brihaspati,[153]

143. Cf. Brihaspati, II, 24, 27.

144. See ante, Chapter III.

145. It deals exclusively with civil and criminal law and procedure. The observations of Dr. Jolly are very significant in this connection. Sacred Book of the East, Vol. XXXIII, p. 276.

146. See Nārada, I.

147. Brihaspati, I. 1. According to him men were originally strictly virtuous and devoid of mischievous propensities.

148. Of the other two kinds of courts one was furnished by the king's signet ring and presided over by the Chief Justice and the other was held in the king's presence. Brihaspati, I.2,3, 25.

149. The different qualifications and functions of these officers including the judges, the scribes and the accountants have been enumerated in details. Brihaspati, 1, 13-15. The relative seats of the different officers and the king are given in Brihaspati, 1, 16

150. Probably for the purpose of taking oath.

151. Brihaspati, 1, 24.

152. This is another significant index of the distinction between crimes and torts; (*Ibid*, I, 28; II, 4-5).

153. *Ibid*, 30-31.

like Yājñavalkya, describes the hierarchy of the different courts beginning with the bodies of kinsmen (Kula) and ending with the king—each successive higher court being competent to hear appeals from the inferior courts. The general rules of procedure, as provided for by Brihaspati in his second chapter, consist of the main division of law into civil and criminal, their sub-division,[154] the general instruction to administer law with reference to all the circumstances of the cases and not by the mere letter of the law,[155] the right of private defence,[156] the four different sources of law,[157] the force of customs, with[158] an enumeration of some of them,[159] the issue of summons to compel the appearance of the parties and witnesses,[160] exemption from such processes and finally an eulogy for a good king doing justice and avoiding injustice.[161]

13. **Judicial proceedings**

Chapters III to VI in Brihaspati deal with the four parts [162] or stages of a judicial pooceeding. The first and the most important part is the plaint which must be free[163] from all defects, susceptible of proof, provided with good and strong arguments precise, reasonable, brief in words, rich in contents, unambiguous, free from confusion, devoid of improper arguments and capable of meeting the arguments of the opposite sides. Plaints, not correctly written, may be impossible, unmeaning and purposeless. When the plaintiff through trimorousness can not dare to speak, the judge should complete the declaration according to the circumstances of the case.

154. There are four topics of crimes and fourteen topics of torts. (*Ibid*, II, 2-11).

155. Reference was made to the story of Maṇḍavya.

156. The right of private defence extends even to the killing of a man, when the latter approaches with intent to murder. (Brihaspati, II, 15-17).

157. The four sources are Dharma, Vyavahāra, Caritra and Rājas'āsana. Each of these has been fully explained by Brihaspati. The edict of the king clearly refers to the judicial decisions made by the king. Royal edicts never imply any legislative enactment, passed by the king. This will be quite clear from the illustrations, given by Brihaspati. See ante, Chapter III.

158. The force of custom was recognised by all the jurists. The Historical school of the 19th century based its whole theory on custom which was regarded as the true type of law. (See ante, Chapter II).

159. No such clear and definite enumeration was to be found in any other jurists. (Brihaspati, II, 28-31).

160. *Ibid*, II. 33-37

161. This was found in common in all the jurists; Brihaspati uses many long-drawn metaphors to emphasise this; *Ibid*, II, 38-42; 1, 9-11.

162. For other details, see Brihaspati, III.

163. The different terms have been explained by Brihaspati along with other details in connection with answer; *Ibid*, IV.

If the defendant cannot fully meet the allegation in the plaint, he will lose the suit; but he may be allowed adjournment for preparing his answer. The insane, the intoxicated and those abandoned by the relations, persons cast from the society and infants are unable to deliver answers. An answer or a written statement may assume different forms, such as confession, denial, special plea etc. The most important part of the actual trial is the evidence by means of which each party will try to establish its case. The judge should, after examining the plaint and the answer, first of all, determine asto on which party the burden of proof will lie ; evidence may be twofold: human and divine—each of which again, is sub-divisible into a number of branches. Human evidence is threefold—oral, documentary and inferential. Oral evidence is adduced by witnesses who may be of 12 different kinds ; documents may be of ten different kinds and inference is of two different kinds. Divine tests or ordeals are again of nine different kinds.[164] Brihaspati has enumerated the different circumstances under which a particular party will be declared defeated. Compromises were always encouraged, specially, when the parties were in doubt as to their respective claims; but no such compromise was to be allowed at a stage when the judgment was about to be announced except on payment of a fine.[165] The judgment or "Jayapatra" should contain the finding of the judge with his reason and a judgment could be appealed against. The king was the highest appellate court. Reference has already been made to the different kinds of witnesses. There should be according to Brihaspati, nine, seven, five, four, three or even two witnesses; in the last case, they must be learned Brahmins ; but no case should be decided on the evidence of a single witness, unless[166] he is a messenger, accountant, an accidental or chance witness or a king or a Chief Justice. In all cases the witnesses should be exhorted by speeches extolling veracity[167] and denouncing

164. Brihaspati seems to take special delight in division and sub-division of the different concepts of law and explanation and illustration of each of them This is one of his general features.

165. This was perhaps an indirect persuation to effect compromise at earlier stages which would avoid much bitterness among the parties and waste of time of the judges.

166. This provision seems to be newly introduced by Brihaspati. Each of the witnesses enumerated herein has got some special reasons of exellence and integrity on account of his position and learning. The evidence of an accountant becomes specially important when he deposes with reference to his account-books containing usual transactions in the ordinary course of business ; (see also Brihaspati, VII, 14).

167. Unlike his predecessors, Brihaspati does not refer in details to caste system at all playing any very important part in deciding the quality of any evidence. All the witnesses were to be exhorted in the same way in the name of truth and justice without any discrimitation of caste ; (*Ibid*, VII, 19-22 ; X, 6).

false-hood. To test the veracity of a witness he might be subjected to cross-examination ; in that case also to cast blemish on a faultless witness[168] was to be punished with fine. The defects of the documents also, if there be any, should be exposed at the time of the trial and not later. Relatives and interested persons were to be excluded as witnesses. Brihaspati also follows Manu and Yājñavalkya in laying down majority and superiority as the standards for accepting evidence in cases of conflict. The growing importance of documentary evidence was to be visible in Brihaspati who insisted on deeds in cases of even partition[169] among brothers. Documents were necessarily to be vitiated by forgery which could be detected by internal evidence and other concomitant circumstances. A genuine execution of documents must be free from fraud, force, duress or undue influence. A peculiar provision was made by Brihaspati by saying that a writing which has neither been seen nor read out for thirty years[170] should not be regarded as valid, even though the witnesses may be living[171] ; subject to this condition, no document could be over-ruled or affected by witnesses or ordeals.[172] Possession is an important mode of evidence, no doubt, but to constitute proprietory right, possession must be coupled with legitimate title except, of course, in cases when undisturbed possession has been held by three generations in succession: in those cases, it is not necessary to produce a title; possession itself is decisive. In this connection Brihaspati also refers to a general principle of law or rather equity that when a man does not raise a protest when a stranger is giving away his land in his presence, he cannot again

168. False evidence given for preserving the life of a Brahmin even though he might have once sinned through error was no sin. No reference has been made to penances to be performed for Varuṇa in such cases like the other jurists. This is another unmistakable indication that Brihaspati got rid of the religious influence to a very considerable extent.

169. Besides partition-deeds, other deeds such as mortgage-deeds, deeds of gift, deeds of purchase, deeds of bondage, deeds or bonds of debts or deeds or edicts by kings in making grants also were advised by Brihaspati. The royal grants, however, might be for various reasons ; (Brihaspati, VII, 4-19).

170. This might be regarded as an additional precaution to vouchsafe the bonafide or genuineness of deeds. According to the fundamental conception of wills, this rule could not apply to them specially when the testator wanted to keep his will as a secret and confidential document upto the time of his death. This also perhaps indicates that no will was recognised by the ancient Hindu jurists in the modern sense of the term.

171. Brihaspati, VIII, 29-31.

172. Brihaspati specially eulogises ordeals when he says that the testimony of witnesses might be vitiated by human weaknesses, such as, avarice, affection or anger ; but no such vitiation could be possible in cases of ordeals duly administered. Again according to him, ordeals were the safest guides whenever there was any doubt regarding the other modes of evidence ; (*Ibid*, XI, 16-17).

recover that estate even though he be possessed of a documentary title thereto.

14. Ordeals

Brihaspati appears to have laid undue emphasis on ordeals which he ascribes to the self-existant Brahmā. He first of all enumerates certain offenders, such as, one responsible for forger of gems, pearls or corals, one withholding a deposit, a ruffian, an adulterer—who must be invariably tried by means of ordeals. He further goes on to say that in charges relating to a heinous crime or to the mis-appropriation of a deposit, the king should try the case by ordeals, even though there might be witnesses. Thus he does not confine the application of ordeals only to cases where other modes of evidence are not available. Oaths in the name of truth, a vehicle, weapons, cows, seeds, gold, venerable Gods or Brahmins and swearing by touching the heads of wives and sons are meant only for trifling offences. Brihaspati enumerates and describes in details[173] nine kinds of ordeals, the ordeals by ploughshare[174] and the Dharma-Adharma[175] ordeal being new with him. It has to be noticed that in Brihaspati, we do not find anything to indicate any liability on the part of the plaintiff in case of proved innocence of the accused person.

15. Debts and deposits

In chapters XI and XII, Brihaspati deals with debts and deposits respectively. Unlike Nārada[176] who prefaces his discussion on debt with religious and moral theories, underlying the liability of debt, Brihaspati[177] like a most practical lawyer begins by saying that debts should be contracted by either pledges or documents. According to him interest is of six different kinds.[178] The limit of interest in cases of debts with or without security for money loans and loans of other articles have been dwelt upon[179] by Brihaspati in

173. The details of rules regarding the application of ordeals have been given in Brahaspati ; (XI, 8-12).

174. It is inconceivable as to how a man made to lick a red-hot iron-ploughshare could escape burning; (*Ibid*, XI, 29).

175. The Dharma-Adharma ordeal was simply in the shape of lottery in spite of the ceremonies required to be undergone for this purpose. It is curious that Brihaspati who is otherwise so modern and rational should enumerate the maximum number of ordeals pleading for their highest efficacy ; (see Pitāmaha, Vīramitrodaya.)

176. See Nārada, I, 257.

177. Brihaspati, XI, 1.

178. *Ibid*, XI. 4-11.

179. *Ibid*, XI, 12-18.

details following his predecessors. A pledge has got to be kept very carefully like a deposit. When the amount of the debt has been doubled and the debtor is either dead or absent, the creditor may sell the pledge in presence of witnesses. When a house or a field has been mortgaged for use and the stipulated period has not expired, the debtor cannot recover the property nor can the creditor his loan. The liabitity of a debt does not involve the great-grand-son[180] and the heirs are not liable to pay immoral debts. Sureties must not be excessively harassed and they should be allowed to pay the debts by easy instalments. Specially the Brahmins should not be placed under any compulsion or labour. The creditor will not be to blame, if he takes recourse to the different methods[181] of realising debts. So far as the law of deposit is concerned, Brihaspati cannot claim anything novel excepting what has already been said by his predecessors including Nārada. Brihaspati, like Nārada, has got exactly the same number[182] of verses in the chapter on deposit though the provisions are not stirictly identical; but even to a casual reader, it will appear that the contentions of both the jurists are substantially the same—regarding the nature and variety of deposits, the extent of liability of the depositary to return the deposit and the application of ordeals in case of refusal of the deposit by the depositary.

16. Sale without ownership

The law of sale without ownership as treated by Brihaspati in the 13th chapter was said to have been declared by Vrigu.[183] Six kinds of such property have been enumerated by him.[184] If the vendor, when produced, cannot explain his ownership, he will have to return the price of the property to the purchaser and shall pay a fine to the king; the property also will be returned to the real owner. The responsibility of the purchaser ceases when he can produce the vendor. Any one prefering a false claim will be compelled to pay a fine equal to double the amount of the value of the property. In absence of evidence, the king shall decide[185] the disputes according to his

180. The father's debt with interest must be paid by the son of the grand-father's debt, only the principal should be paid by the grandson; the great-grand-son should not pay anything at all.

181. Brihaspati, XI, 54-59.

182. Fifteen verses have been devoted by each jurist.

183. The reference to Vrigu lends supports to the traditional remodelling of the original composition by Manu ; (see Maṇḍlik's Hindu Law, P. 47. The Mahābhārata, XII, 22,59,80).

184. The enumeration is illustrative rather than exhaustive; the topic applies to any case of "Asvāmin".

185. This is an instance where the king perhaps makes a new law by his judicial decision or edict ; (see Brihaspati, II, 24, 27).

own discretion. Open and bonafide purchase from known vendors is naturally the safest;[186] any suspicious[187] transaction should be viewed as fraudulent. The fourteenth chapter in Brihaspati deals with partnership. Unlike Nārada, he does not define[188] partnership but gives some general instructions based on worldly experience as to what kind of men should be taken as partners who must decide their own disputes taking recourse to ordeals,[189] if and when necessary. Subject to the rule of implied agency[190] *inter se* and the loss or injury from fate and the king[191] each partner has to be rewarded or made liable for compensation for special excellence or negligence.[192] In case of death, a partner's property should be returned to his rightful heir or in his absence, it should be taken by the king who is tabooed from appropriating the property of a Brahmin.[193] The application of the principles of partnership with respect to sacrifice,[194] loan, cultivation of lands, industry and mine has been discussed by Brihaspati in the latter part of the chapter.[195] Resumption of gifts has been dealt with by Brihaspati in the 15th chapter. Unlike Nārada, he does not explain the meaning of the topic.[196] But like Nārada, he divides gifts into two classes, to wit, valid and invalid. There are according to him eight kinds of valid gifts[197] and eight kinds of invalid gifts. Nārada, of course, has 16 kinds of the latter.[198] Subject to this difference, the provisions on this made by both Nārada and Brihaspati are almost identical. The most significant category of invalid gifts is the gift of the entire property of a man. Commenting on this text of Nārada (which is to be found is substance in Brihaspati also), Asahāya[199]

186. In the case of purchase which is otherwise bonafide only except the fully known whereabouts of the vendor, the real owner may recover the property by paying half the price to the purchaser—each losing half ; (*Ibid*, XIII, 7-8.).

187. Sales at low prices, at secret places, in unearthly hours, by dishonest men are to be treated as fraudulent ; (*Ibid*, XIII, 10-11.)

188. See Nārada, III, I-I; Brihaspati, XIV, 1-5.

189. Brihaspati, XIV, 6-7.

190. Nārada, III, 5-6; Yājñavalkya, II 260 ; Brihaspati, XIV. 8-9.

191. Brihaspati, XIV, 10.

192. See above.

193. Brihaspati, XIV,

194. *Ibid*, XIV, 14-16. Kauṭilya, Book III, Chapter XIV.

195. The topics discussed by Brihaspati in the latter part of the 14th chapter are not to be found in Nārada who deals with tolls at some length; (see Nārada, III, 12-14).

196. This is more or less true of all the topics.

197. In the expression "valid gifts" the term gift has been used in a much wider sense almost without any justification. The wages, prices etc., for instance, cannot and should not be included within gift according to the modern conception of the term.

198. Nārada, IV, 3.

199. Cf. The theory of Jīmūtavāhana advocating absolute right of the owner in Bengal.

says, "that only may be given which is left after the cost of living has been defrayed for those whom the head of the family is bound to maintain. Any gift on the other hand which causes hardship to the family is reprehensible and not meritorious."

17. Master and servant : wages

Brihaspati deals with the relation between master and servant and non-payment of wages in chapter XVI. For these subjects Nārada devotes two titles (V and VI). The treatment of the former is much more brief and precise as many extraneous and unconnected topics were dealt with by Nārada.[200] Brihaspati after dividing and sub-dividing the classes of servants[201] and their relations deals with the liabilities[202] of the parties in case of violation of the stipulated terms and conditions. For violation of agreements or samayas, Brihaspati, like Nārada, devotes a special chapter. These agreements[203] should be observed and acted upon at the time of distress and for the performance of acts of piety on pain of punishment by the king.[204] The rights and liabilities of the associations are their own.[205] Rescission of contracts of purchase and sale has been dealt with by Brihaspati in chapter XVIII. He chooses to avoid the details indulged in by Nārada. As a matter of fact, Brihaspati disposes of the entire topic by simply laying emphasis on the doctrine of *caveat emptor*.[206] In his treatment boundary disputes are to be determined with reference to visible and invisible signs and the evidence of neighbours, specially the elderly ones ;[207] Brihaspati enunciates many new principles including alluvion[208] and diluvion, easement[209] and other rights and liabilities of the "Bargādārs,"[210] though strictly speaking many of these topics[211] have hardly

200. See ante. Cf. Nārada, V, VI.

201. Brihaspati, XVI, 1-13.

202. *Ibid*, XVI, 14-20 ; Nārada, V, VI ; Manu, VIII, 215 ; Mitakṣarā, p. 268; Āpastamba, II, II, 28. 2-3 ; Viṣṇu, V, 153-154 ; Yajñavalkya, II, 193.

203. For the formation of agreements and associations mutual confidence must be inspired by ordeals oaths, sacred libations, written documents or by umpire ; (Brihaspati, XVII, 7).

204. *Ibid*, XVII, 18 20 ; Nārada, X.

205. Brihaspati, XVII, 22-24 ; Ratnākara, pp 186-87 ; Colebrooke's Digest, III, 2.30,31 ; Vīramitrodaya, P. 432.

206. Nārada, IX, 3 : Vīramitrodaya p. 433 ; Colebrooke's Digest, III, 3,11.

207. Nārada, IX, 2,12 ; Manu, VIII, 246-51 ; Yājñavalkya, II, 251.

208. Brihaspati, XIX, 16-18 ; 20-21 : This subject is treated for the first time by Brihaspati, though Narada only refers to alluvion ; (see Nārada, XI, 6).

209. A window, a water-course, a peg, a square of four buildings and a channel for the exit for rain water must not be blocked up ; (Brihaspati, XIX, 24-25).

210. A "bargādār" in the modern sense of the term failing to raise crops in the field leased out was to pay compensation ; (Brihaspati, XIX, 29).

211. *Ibid* XIX, 3-7.

anything to do with the boundary-disputes at all. Thus according to Brihaspati, to obviate boundary-disputes altogether, dry cowdung, bones, chaff, charcoal, stones etc. contained in vessels should be placed on the boundary and should be shown as such to the youths and infants who in their turn (when they grow old) should proclaim the same to their own children. Again when a river has once been fixed as the boundary between two villages or lands, it should continue to be such whatever position the river might chance to take at any particular time.[212]

18. Criminal law

Brihaspati deals with the different topics of criminal law in chapters XX to XXIII. He uses the word sāhasa (or violence) in two distinct senses—wide and narrow. In its wide[213] sense, sāhasa virtually comprises all criminal acts such as defamation, assault, homicide, theft including robbery and sexual offences and in the narrow[214] sense it means only the last four offences. The term theft again has been used to mean secret theft or open theft. Nārada[215] explains the different elements of theft and sāhasa by characterising them as different species of the same genus, namely, sāhasa. No such explanation or distinction is to be found in Brihaspati. According to the Vīramitrodaya (p. 490), a criminal act (ādhi) *i.e.* injuring another man's property through a forcible attack or violence is called theft equivalent to sāhasa ; a criminal act done by fraud is called ordinary theft.[216] Each of defamation (Vāk-Pāruṣya) and assault (Daṇḍa Pāruṣya) has been divided into three species and punishment therefor has been declared as threefold. The punishment for crimes generally has been provided for in terms of variation—sometimes direct and sometimes inverse—of the castes. Rank also played a significant part in determining the punishment not only for defamation but also for assault.[217] It is no offence to inflict an injury including even death in exercise of the right of private defence.

Cruelty[218] to animals also was declared by Brihaspati as an offence

212. This principle has been recognised even in the Alluvion and Diluvion Regulation of Bengal.

213. Brihaspati, XXII, 1.

214. *Ibid*, XXIII, 1.

215. Nārada, XIV, 12,

216. Manu, VIII, 332.

217. Brihaspati, XXI, 3. The importance of rank in determining defamation can be easily understood ; but it is difficult to understand its importance in adjudging the nature of assault unless some discrimination is made between the life and person of one man and another.

218. A man employing tired, hungry or thirsty animals for drawing and carrying was to be regarded as a cow-killer and was directed to atone for it or pay a fine ; (Brihaspati, XXII, 16).

punishable with fine. In chapter XXII, Brihaspati deals with the various kinds of heinous offences or offences involving violence, such as, homicide, theft, robbery and so on and provides for different kinds of punishment beginning with mutilation of limbs and ending with infliction of capital punishment which might be in the shape of hanging, drowning, burning etc. The heinous offence of adultery has been treated by Brihaspati in chapter XXIII. Adultery has been described as of three different classes, namely, forcible, fraudulent and sensual—each of which has been explained and illustrated in details. It has also to be noticed that the term adultery has been used in a much wider sense to include even winking or smiling at a woman. Mutilation of limb *inter alia* is the punishment for a man who violates an unwilling woman[219] and for a woman who appears at another man's house and excites his concupiscence by touching his body or such other acts. A man violating a woman of the higher castes shall be put to death. In case of imposition of fines for adultery, very heavy fines must be inflicted on very rich men.[220]

19. Relation between husband and wife

Brihaspati does not deal with the law of husband and wife[221] as fully as Manu,[222] Yājñavalkya,[223] Nārada,[224] or even Kauṭilya.[225] Nor is he unduly harsh on women about their rights and position. The only thing emphasised by Brihaspati is that women should be kept under strict guards[226] through constant occupation in domestic duties and by never-failing vigilance by the other members of the family. He also advocates early marriage[227] and refers for the first time after Viṣṇu, to the "sati-rites"[228] emphatically asserting at the same time the right of a widow to

219. When a woman has been violated against her will, she shall be entitled to maintenance and made to perform the Kricchra or Parāka penances ; (Brihaspati, XIII, 13, 14).

220. Small or nominal fines imposed on rich men become absolutely meaningless even from the standpoint of modern principles of criminology ; (*Ibid*, XXIII, 101.

221. Brihaspati, Chapter XXV.

222. Manu, IX.

223. Yājñavalkya, II.

224. Nārada, XII.

225. Kauṭilya, Arthas'āstra, Book III, Chapter III.

226. Brihaspati, XXIV, 2, 10, Manu, IX, 2-24.

227. Brihaspati, XXIV, 69, Viṣṇu, XXIV, 41; Manu, IX. 4, 93.

228. A wife is regarded as half the body of her husband equally sharing the result of his good and bad deeds and as such she is declared to be entitled to her husband's property after his death. Brihaspati follows Nārada in this respect and both of them differ from Manu and agree with Yājñavalkya ; (Brihaspati, XXII, II, XXV, 47, 55.).

inherit[229] her husband's property specially in absence of sons and appointed daughters. He deprecates the system of Niyoga[230] and does not countenance the uncertain views of Manu on the subject. Whatever might be the state of law, in the first three ages, Niyoga and most of the secondary sons were discontinued in the Kali age.[231] The law of inheritance has been dealt with by Brihaspati in chapter XXV. Division of property[232] amongst brothers is to take place after the death of both the parents or during their life-time, when the mother is past the age of child-bearing. The father has got absolute authority over his self-acquired property; but so far as the ancestral property is concerned, he is only a joint tenant with his sons.[233] The father can dispose of his self-acquired property in any way he likes making unequal distribution even among his own sons. After partition the father is to retain two shares for himself and division of property also implies multiplication of religious rites.[234] Preferential shares[235] have been recognised in favour of the eldest son—whose true merit should be determined with reference to his learning and character. A son born after the partition is entitled to all the property acquired by the father thereafter.[236] There cannot be any adverse possession against a co-heir or a joint co-sharer.[237] An aurasa son and a putrikā putra alone are entitled to inheritance; the rest can claim only maintenance. He discriminates between secondary sons and denounces a kṣetraja, a paunarbhava, a niṣāda, a kānina, a sahoḍha and a gūḍhaja son.[238] Inheritance is to follow the offering of Piṇḍa; sapiṇḍas, sakulyas and bāndhavas have been recognised as heirs and the relative priority among themselves also has been determined. Wives and daughters have been declared entitled to inheritance; (Brihaspati, XXV, 45-46). Immovable property given to a woman constitutes her limited interest. When a woman inherits any property, she must be liable[239] to maintain the relatives who were so entitled before her inheritance. Brihaspati criticised the view of Manu that clothes and ornaments should not be divisible.[240] The reasons given by him

229. *Ibid.*

230. *Ibid*, XXIV, 12-13.

231. *Ibid*, XXIV, 13-14.

232. Gautama, XXVII, 1; Baudhāyana, II, 8; Manu, IX, 104, 192; Yā ñavalkya, II, 117.

233. This is the view of the Mitākṣarā. Cf. Dāyabhāga, II 82. Colebrooke.

234. Brihaspati, XXV, 6.

335. Gautama, XXVIII, 5-13; Āpastamba, II. 6-10, 14; Baudhāyana, II, 39; Vasiṣṭha, XVII, 42; Manu, IX; Viṣṇu, XVII, 37; Yājñavalkya, II, 114, 124.

236. Brihaspati, XXV, 5.

237. *Ibid*, XXV, 24.

238. *Ibid*, XXV, 40.

239. *Idid*, XXV, 15.

240. *Ibid*, XXV, 79-80.

are quite cogent and as a matter of fact considerable property might take the shape of clothes and ornaments. He provides special rules for the divisibility of different species of property.[241] When a man dies having no issue nor wife[242] nor brother nor father nor mother, all his sapiṇḍas shall divide the property in due shares and in that case half the entire wealth first shall be set apart for the benefit of the deceased owner and carefully assigned for his family, six-monthly and annual Shrādhs. Escheat[243] does not apply in case of a Brahmin's property. Strīdhana goes to the children and the daughter, if not betrothed, has a share in it, if the daughter is married, she shall receive an honorary trifle only.

20. **Gambling and betting**

Though prohibited by Manu, as destructive of truth, honesty and wealth, gambling and betting have been recommneded by Brihaspati like Kauṭilya, Yājñavalkya and Nārada to be practised under state-control and superintendence for the purpose of revenue *inter alia.* The treatment of this topic by Nārada and Brihaspati is almost similar. Brihaspati has dealt with the 18 topics of law in 17 chapters, the last chapter being a styled by him, like Nārada as miscellaneous.[244] According to Brihaspati, any Smriti militating against the Manu-Smriti has to be disapproved. But it is curious that Brihaspati himself had sometimes commented on or had deviated from the provisions made by Manu, specially with reference to the divisibility of clothes and ornaments,[245] the maximum interest,[246] allowed on corn, fruit, wool etc. and the rights of inheritance[247] on the part of widows. In case of conflict between two Smritis, the king should decide disputes with reference to equity and when the texts are inapplicable, the case should be adjudicated by taking all the relevant circumstances into consideration.

241. *Ibid,* XXV, 81-88.

242. Nārada, XIII, 51-52, Brihaspati XXV, 67-68 : Regarding the meaning of the term "his women" in the two above verses, see the explanations of the commentators like Vijñāneśvara, Nīlakaṇṭha and others referred to at p 202, Vol. XXXIII of Sacred Book of the East.

243. Brihaspati, XXVI. 8 ; Nārada, XVII, 2; Āpastamba, II, 10, 12, 13, 35 ; Yājñavalkya, II, 199-200.

244. Regarding the character of the contents of these two chapters, see the remarks of Dr. Jolly at page 214 of Vol. XXXIII of the Sacred Book of the East. There is, however, some difference in the two opening verses of the two Smritis.

245. Brihaspati, XXV, 79-80, quoted by the Vyavahāramayūkha and Aparārka on Yājñavalkya, II, 119.

246. Brihaspati, XI, 13-16, as quoted by Aparārka on Yājñavalkya, II, 39 ; Manu, VIII, 151.

247. Brihaspati, XXV, 45-46, quoted by Aparārka on Yājñavalkya, II, 135.

When the offence is found out, different punishments should be inflicted according to the gravity of the offences.[248] Some rules also have been enunciated by Brihaspati for determining the relative validity of transactions.[249] The verses 19-24 appear to have been misquoted. Verses with almost indentical contents have already been enumerated as illustrations of the different customs and usages prevailing in different localities and among different peoples.[250] In this chapter litigation has been broadly classified as those started by the litigants themselves among the subjects and those initiated by the king[251] for the preservation and prosperity of the society. In the last verse, however, Brihaspati alludes to a very important theory of criminal jurisprudence. Thus he says that when the safety of many may be secured by destroying a single offender, the king should not hesitate even to inflict the heaviest punishment of capital sentence.[252] Moreover, such execution will be productive of religious merit on the part of the king and the offender—the reverse of which will be reprehensible.

21. Kātyāyana

The next Smriti analogous to those of Nārada and Brihaspati is that of Kātyāyana. His entire work has not been preserved independently ; he is known from quotations of other Smriti-writers and more generally of commentators. This is more or less true of all the authors of the Smritis after Nārada and Brishaspati except Parāśara whose work alone has come down to us in an independent shape, though it is suspected that the exact original Parāśara-Smriti has not been preserved. Again this (Parāśara Smriti) belongs to that category[253] of Smriti-works which contain very little or nothing of law proper. The extant Parāśara-Smriti deals exclusively with ācāra and prāyaścitta. But the commentator Mādhavācāryya introduces perforce and indirectly[254] the topics[255] of law in his commentary while

248. Brihaspati also mentions the 14 different parts of the body where punishment has got to be inflicted. Brahmins are exempted from corporal punishment ; (Brihaspati, XXVII, 4-12).

249. *Ibid*, XXVII, 13-18.

250. *Ibid*, II, 28-31.

251. *Ibid*, XXVII, 1, 2, 5.

252. By inflicting exemplary punishment on individual offenders maximum benefit can be vouchsafed for the maximum number of the peace-loving citizens.

253. This category includes Angiras, Riṣyas'ringa, Kārṣṇājini, Catur-Viṃs'atimata, Dakṣa, Pulastya, Pracetas, Laugākṣi, Vis'vāmitra, Ṣaṭtriṃs' aṇmata and Parās'ara.

254. Parās'ara Mādhavaya, p. 8, commenting on Parās'ara, Chapter I, p. 6. (Bombay Sanskrit series).

255. Kauṭilya refers to Parās'ara several times on various aspects of politics and public administration. Hence, Parās'ara might be the author of a work on politics wherefrom the above verse might have been taken.

explaining a particular verse of Parāśara which is also more in connection with politics than with law proper. Kātyāyana enunciated many theories on advanced views like Nārada and Brihaspati. The Nibandhas also ascribed several verses to Kātyāyana along with Manu, Yājñavalkya and Brihaspati. Viśvarūpa and Medhātithi also treated him as eminent a Smriti-kāra as Narada and Brihaspati. Kātyāyana's treatment of strīdhana and the explanation of the different varieties thereof have "attained classical rank" in the words of Kane.[256] From the nature of his relation with Nārada and Brihaspati, Kātyāyana could not flourish much later than them. The other Smriti-writers who dealt with law *inter alia* were Pitāmaha, Prajāpati, Marīci, Yama, Saṃvarta, Vyāsa and Hārīta. The Saṃgraha or the Smriti-Saṃgraha was an important collection[257] of Smriti-materials including many important topics of law. Excepting one verse on Śauca, as quoted by Viśvarūpa, the verses quoted by the Mitākṣarā and Aparārka refer wholly to Vyavahāra and specially to the ordeals which were nine in number according to him. He also refers to the different kinds of "chalas" when the king was to take action of his own initiative.[258] In defining the different kinds[259] of documents, Pitāmaha[260] seems to have followed Vyāsa. Prajāpati, as quoted by Aparārka, deals with few legal topics, such as, witnesses and ordeals. According to the Vyavahāra-Mayūkha, the Parāśara-Mādhavaya[261] and the Smriti-Candrikā, he also defines and classifes "uttara" or written statement. He also recognised the right of a sonless widow to succeed to her husband's wealth.[262] The only important legal topics to be found in Marīci are the necessity of written documents for the purpose of completing sale, mortgage, partition and gift of immovable property[263]

256. For instances on other topics of law, see his History of Dharmas'āstra, Vol. I, pp. 213. et seq.

257. The other two works of analogous nature were the Catur-Viṃs'atimata and the Ṣaṭriṃs'anmata which, however, did not deal with any legal mattter. All these three collection-works appear to be of late dates as none of them was noticed by Vis'varūpa and Medhātithi who otherwise seem to have ransacked the whole extant literature for discussing and illustrating the different topics.

258. See the miscellaneous chapter of Nārada and Brihaspati where the scope of actions to be brought by the king himself has been discussed.

259. Krayapatra, Sthitipatra, Sandhipatra, Vis'uddhipatra; (Parās'aramādhavya, Vol. III, p. 128. See also the Smriti Candrikā).

260. For the discussion of the other legal topics by Pitāmaha, see Kane, History of Dharmas'āstra, Vol. I, p. 226-27.

261. Vol. III, pp. 69-73.

262. Parās'aramādhavya, Vol. III, p. 128.

263. Aparārka p. 775.

along with the conditions and characteristics of a valid sale or purchase. Viśvarūpa, Aparārka and others have quoted more than 300 verses attributed to Yama on the different topics of Dharmaśāstra including law proper. Most of these important topics including the administration of law, capital sentence etc. have been discussed by Kane.[264] More than 200 verses[265] of Vyāsa have been quoted by the several commentators including Aparārka and others. These verses clearly indicate a close affinity between the work of Vyāsa on the one hand and the works of Nārada, Brihaspati and Kātyāyana on the other. The legal topics quoted from Vyāsa deal with the different kinds of "uttara", documents, the requirements of royal grants and the nature of adverse possession[266] with the enumeration of its different characteristics.[267] Vyāsa speaks of seven kinds of sureties while Hārīta and Kātyāyana speak of only five and Brihaspati of only four. His characteristic provision for the inheritance of a widow is to fix it to the maximum[268] of 2000 Kārṣāpaṇas out of the property of her husband. Father and son were given equal shares in the ancestral property and the son could claim partition even against the father.[269] Vyāsa must have flourished near about the time of Nārada and Brihaspati. Saṃvarta enumerated as a Smriti-writer by Yājñavalkya has been copiously quoted by a host of commentators. The striking legal topics ascribed to him are : (1) oral testimony should not affect documentary evidence[270] ; (2) mere documentary title cannot be effective in absence of actual possession[271] ; (3) unless other wise stipulated, no interest was to be allowed in certain cases[272] ; (4) and lastly, the king was enjoined to take action *suo matu* without any private man's complaint in case of ten offences.[273] Hārīta is the only jurist who has given a definition of the word Vyavahāra[274] as it has been quoted in the Smriti-Candrikā. He also, like Nārada, refers to the four sources of Vyavahāra and attaches considerable importance to documents[275] and

264. History of Dharmas'āstra, Vol. I 234-235.

265. Quotations are made by the different commentators according to the necessity and relevancy of their discussions. Hence, it is not always possible to give an exhaustive account of the works quoted by them.

266. Aparārka, p. 632.

267. *Ibid*, p. 635.

268. *Ibid*, p. 752.

269. *Ibid*, p. 728.

270. Cf. Section 92 of the Indian Evidence Act.

271. The Parās'aramādhavya, III, 44.45.

272. The Smriti-Candrikā, p. 157.

273. The Parās'aramādhavya, III, 44-45. (Cf, last chapters of Nārada and Brihaspati).

274. See ante, Chapter II.

275. Aparārka on Yājñavalkya, II, 90,

provides for elaborate rules for plaints, written statements and burden of proof.[276] The relative importance between title[277] and possession also has been explained by him with the help of a metaphor. According to him sureties are of five kinds and women should be subject to a perpetual tutelage. He, of course, makes provisions for the maintenance of adulterous women.[278] Comprising various important topics of law and copiously quoted by the different commentators, the Saṃgraha or the Smriti-Saṃgraha is a very significant compilation, the only of its kind.[279] It contains a very useful definition of the word "Dāya"[280], the requisites of a plaint, two kinds of documents and seven kinds of ordeals. According to this work, ownership must be based on the provision of the Śāstras and as such it must be contradistinguished from earthly or laukika ownership.[281] Special share to the elder son, Niyoga and offerings of cows were to be prohibited according to this work.[282] There are striking points of similarity between this compilation and the work of Dhāreśvara.[283] Pitāmaha, Yama, Hārīta and the Saṃgraha will be discussed in greater details separately.

22. **Pitāmaha, Yama and Hārīta**

After Nārada, Brihaspati and Kātyāyana, the Smritis that deserve special mention are those ascribed to Pitāmaha, Yama and Hārīta. Pitāmaha was frequently quoted by the Mitākṣarā, the Smriti-Candrikā and Aparārka. He refers[284] to nine ordeals like Brihaspati though Yājñavalkya and Nārada referred to only five. He also defined, classified and distinguished the different kinds of documents—which could be of different nature like Krayapatra, Sthitipatra, Sandhipatra and Viśuddhipatra.[285] The different elements of perfect legal possession also have been enumerated by him as follows : it must have a title and long duration ; it must not have been interrupted and impeached and it must have been asserted in presence of the opponent :

276. Mitākṣarā on Yājñavalkya, II, 6, 7.
277. The title has been compared with the root of the tree and possession with its branches.
278. Mitākṣarā on Yājñavalkya, II, 135.
279. See ante.
280. "Pitridvārāgataṃ dravyaṃ mātridvārāgataṃea yat,
Kathitam dāyas'abdena tadvibhāgodhunocyate." Parās'aramādhavya, III, p. 478.
281. Smriti-Candrikā, p 257 ; Gautama, X, 39.
282. Parās'aramādhavya, II, p. 492.
283. For other particulars see Kane, History of Dharmas'āstra, Vol. I, pp. 240 et seq.
284. Aparārka, p. 601 ; Cf. Yājñavalkya, I, 3.
285. Parās'ara Mādhavya, Vol III, p. 128.

"Sāgamā dīrghakālā cāvicchinnāparavojjhitā,
Pratyarthisannidhānāca bhuktiḥ pancabidhā smritā".

The relative excellence of the different kinds of documents[286] is very significant: a private document under one's own handwriting is inferior to a publicly written document which again is inferior to a king's edict. Any documentary evidence of possession is again inferior to actual physical possession running over three generations.[287] Pitāmaha also refers to the hierarchy of the different courts like Nārada and Brihaspati.[288] He also refers to the twenty two titles of law to be taken cognizance of by the king. In the court room also there should be eight constituents.[289] From the above definitions, classifications, enumerations and subdivisions of the different legal concepts and principles, it is quite clear that Pitāmaha belonged to a time about the 5th or the 6th century A.D. if not later. All the characteristics of the juristic writings of the "triumvirate", referred to above, were to be more or less found in Pitāmaha also. Yama has been quoted frequently by the commentators like Viśvarūpa, Vijñāneśvara, Aparārka and the Smriti Candrikā. Most of these quotations refer to the usual Dharmaśāstra topics. The exclusive references to the topics on Vyavahāra are regarding the age of the girls[290] for marriage, infliction of capital punishment,[291] administration of justice by the king[292] and the inheritance of strīdhana[293] property. Yama was definitely in favour of child marriage.

Hārīta is the only author who has given the definition[294] of Vyavahāra. Of course, the different feet of Vyavahāra have been mentioned by other jurists, such as, Nārada[295] and Yājñavalkya. He also attached special importance to documentary evidence.[296]

286, 287. "Svahastakājjānapadaṃ tasmāttu nripas'āsanaṃ
Tatastraipuruṣobhogaḥ pramāṇataramiṣyate."

288. "Grāme driṣṭaḥ pure yayat pure driṣṭastu rājani
Rājñā driṣṭaḥ kudiṣṭovā nāsti tasya punarbhavaḥ"
"Grāmagoṣṭhpuras'reṇisārthasenānivāsinām,
Vyavahāras'caritreṇa nirṇetavyo brihaspatiḥ."

289. Cf. Nārada, Introduction, verse 15. Also the Smriti-Candrikā.

290. Cf. Smriti-Candrikā.

291. "Viṣāgnidāyakās'cauraghātakos'copaghātakāḥ,
Svas'arīreṇa daṇḍavyāḥ Manuraha Pajāpatiḥ."

292. "Rāja mantrisahastadvayorvivādamānayoḥ,
Samyak käryānyavekṣataḥ ragadveṣavivarjitaḥ."

293. "Āsurādiṣu yaddravyaṃ vivāhebṣu pradīyate".
"A prajayāmatītāyām pitaivatu dhanaṃ haret".

294. See ante; Chapter II.

295. Introduction Chapter, verse 10.

296. Aparārka on Yājñavalkya, II, 90.

Elaborate rules were provided for by Hārīta regarding the different elements of plaints, written statements, burden of proof[297] and the summoning of the witnesses and the defendants.

23. The Saṃgraha or the Smriti-Saṃgraha

This work deserves more than a passing notice. As the name indicates, it is a collection or a compilation. Again it must not be treated as a mere slavish collection from the texts of other Smriti-writers. In this sense it is not a compilation at all; it is a distinct original work on the Smriti material—sometimes offering quite new views and theories which might at once appear to be much more advanced and analytical than even the views of Nārada and Brihaspati. The identity of the author or the real extent of the work cannot be ascertained with precision. The very fact that the work was copiously quoted by almost all the important commentaries indicates that it became at one time very popular and significant. It may be treated as a collection or compilation in the sense that it covers the entire range of Smriti topics discussed by the various foregoing authors of the Dharmaśāstras. Hence, necessarily the author must have flourished at a late period of the Indian history. There are many views of this author which curiously enough agree with those of Dhāreśvara Bhoja—who reigned in the 11th century A. D. From the agreement between some of the views of Bhoja and the Saṃgrahakāra, it is believed that the latter was closely followed by the former. Hence, the Saṃgraha must have been compiled before the 11th century A. D.

Reference may be made to some of the peculiar views of the Saṃagraha-kāra: Thus he devotes five verses to elaborate the features of a plaint ; he classifies documents as rājakīya and jānapada. He refers to seven ordeals like Nārada though Brihaspati and Pitāmaha speaks of nine ordeals. Again he defines dāya "as the wealth that is handed down through father and mother" :

"Pitridvārāgataṃ dravyaṃ mātridvārāgataṃca yat
Kathitaṃ dāya śabnena tadbibhāgodhunocyate".[298]

He further holds that "ownership arises from the dictates of the Śāstra and was not an affair of the world (laukika) and puts forward two reasons in support of his theory, *viz.* if ownership were laukika, it would not be possible to make such assertions as his wealth has been wrongfully seized by another and the texts (vide Gautama, X, 39) laying down the means of acquisiton of wealth for the several varṇas would be meaningless. Dhāreśvara held the same view. These views were elaborately criticised

297. Mitākṣarā on Yājavalkya, II, 6, 7.
298. Parās'ara Mādhavaya, III, p. 478.

by the Mitākṣarā. According to the Saṃgrahakāra partition creates ownership in the son as regards paternal wealth (in which he has no right by birth). Dhāreśvara entertained the same opinion which was vehemently controverted by the Mitākṣarā holding that partition takes place of that in which one has already ownership. According to the Saṃgraha, ownership does not consist in being able to dispose of a thing at one's sweet will, since it is the Śāstra that prescribes the proper disposal or application of all things.[299]

The Saṃgrahakāra was in favour of giving a special share to the eldest son ; but he discouraged and prohibited Niyoga. He also propounds another peculiar view that if of several full brothers one has a son, all the brothers may be regarded to have a son thereby ; again if one of the several wives of a man has a son, all the co-wives may be regarded as putravatī.[300] He also provides[301] the order of succession of a sonless man thus : widow, the putrikā daughter, mother, paternal grandmother, father, full brothers, half-brothers, the line of the father, the line of the grandfather, the line of the great-grand-father, other sapiṇḍas, the sakulyas, the proceptor, the pupil, a fellow student and a learned Brahmin. Homicides and other offences committed with force or violence were included within sāhasa.

24. Other Smriti works

Reference may be made in passing to the Smriti-writers such as Angiras, Ṛiṣyaśringa, the author of the Caturviṃśatimata, Prajāpati, Saṃvarta on the one hand and Kārṣṇājini, Dakṣa, Pulastya, Pracetas, Laugākṣi, Viśvāmitra and the author of the Saṭtriṃśanmata on the other. In the former group of these Smriti works there are only a very few discussions of strictly legal topics, the most of the discussions having been devoted to the usual Dharmaśāstra matters other than vyavahāra. Again in the second group of Smriti works, referred to above, there is hardly any legal topic discussed in any one of them, the entire works being occupied by non-legal topics altogether. Angiras refers to the constitution of the Pariṣad and prohibits the Sati-rite for a Brāhmana wife. He characterises the Dharmaśāstra of Manu as the supreme guide and mentions are made of Bṛhad-Angiras and Madhyama Angiras by the Mitākṣarā and other works. There is no other legal topic ever discussed by Angiras.

The only reference to a legal topic by Ṛiṣyaśringa is that when one coparcener recovers, with his own efforts, the family propety that was lost

299. Kane, History of Dharmaśāstra, Vol., I, p. 240.
300. Cf. Manu, IX, 182-183.
301. Viśvarūpa on Yājñavalkya, I, 9 ; Aparārka, pp.22-23.

to it, he is entitled to one-fourth share of it and the remainder is to be distributed among the rest:[302]

"Pūrvanaṣṭām tu yo bhūmimekaśceduddharet kramāt,
Yathāṃśaṃtu labhantenye dattvāṃśaṃ tu turīyakaṃ."

According to the Caturviṃśatimata, the teachings of Arhat, Cārvāka and Buddha mislead the people and hence, it emphasises that whatever is not to be found in the Vedas, or the Purāṇas, or the Rāmāyaṇa or the Mahābhārata or the Śāstras of Manu and others is as good as non-existent:

"Arhaccārvākavākyāni Bouddhādipaṭhitānica,
Vipralambhakavākyāṇi tāni sarvāṇi varjayet."[303]

The only legal topics that have been found quoted from Prajāpati are regarding ordeals, witnesses, written statement and the succession of a sonless widow to her husband's wealth.[304]

According to Saṃvarta, however, oral testimony has got to be discarded when it contradicts a documentary evidence.[305] Actual possession also has been preferred to mere paper title.[306] The other legal topics discussed by him are interest, deposit, suretyship and the enumeration of ten wrongs where the king should take cognisance *suo matu*[307] without any complaint from anybody. These offences include among other things champerty and maintenance.

302. The Smriticandrikā, I, p. 32.
303. *Ibid*, I, p. 5; Parās'aramādhavya, Vol. I, Part I, p. 10.
304. The Smriticandrikā, p. 291; Parās'aramādhavya, Vol. III, p. 536.
305. Aparārka, pp. 691-92.
306. Parās'aramādhavya, III, p. 146.
307. *Ibid*, II, 44-45.

CHAPTER VIII

The Nibandhas and the Commentaries : The Earlier Works.

1. The Nibandhas and the commentaries : their importance

The Nibandhas and the commentaries played a very important part in the development of the Hindu law, so much so, that in many cases greater importance was attached to the commentators and the Nibandhakāras than to the original text-writers themselves. It is really very interesting to know as to how this type of literature could attain so great an importance and popularity. The reasons must be sought in the fact that legal experts were consulted in deciding cases even at the time of the Smritis themselves. The Smriti texts were there, but their interpretetions differed and the meaning of the text also was not known equally to all the people. There was only a certain class of people who were supposed to have mastered the texts and were in a position to give opinion on legal matters on account of their learning and eminence. The people also had explicit as well as implicit faith and confidence in their opinions and as such the opinions were taken as more or less binding upon all. The king himself also was enjoined to consult expert opinion in order to avoid miscarriage of justice. This view was so widely and unhestitatingly accepted by all concerned that even an ordinary man who was capable of giving the correct opinion on a point in the adjudication of a case was to give his opinion even unasked ;[1] of course, it was for the king to accept or reject it. It can be presumed that the king and his judges also could not turn down the opinion, if correctly given, as otherwise, the system could not thrive at all. A similar system of consulting the opinion of expert jurists prevailed in ancient Rome as well. But there was a fundamental distinction between the two systems, as they prevailed in ancient Rome and in ancient India. It is not clearly known if the Roman jurists at the same time had to give reasons and arguments in support of their opinions. But in India, opinions were always to be based on reason and scientific discussion. It was for this reason that at one time in Rome, some rules had to be laid down by the Law of Citations. There is express provision in the Smritis themselves that

1. It was encumbent on everybody to see that justice was rightly administered, as maladministration of justice would affect the whole kingdom. During the Muslim rule and the British rule also the system of consulting experts prevailed.

judges or councillors must remonstrate with the king in actually deciding cases correctly so that there might not be any sin on the part of the king. In India no rules like the Law of Citations could be necessary. The opinions themselves were adjudged with reference to their inherent reasons and intrinsic merit. This can be well-nigh illustrated by reference to the development of the independent science of the Mīmāṃsā system which was the basis of the discussions of all the commentators and the Nibandhakāras. The science of Mīmāṃsā, developed at a very early stage of the Hindu civilisation, could very well emulate even the modern jurists who lay due emphasis on the rules of construction, specially for statutes and written documents. As in ancient Rome the experts were from among the jurists, versed in the science of law, so in ancient India also, the commentetors and Nibandhakāras were exclusively from the Brahmins, who were versed in the scriptural lore comprising the Dharmasūtras and the Dharmaśāstras. As civil or positive law formed a very small portion of the entire Smriti material in general, so also law was to be found sparingly in the commentaries and the Nibandhas, the authors of which were not always jurists or lawyers. The science of law was hardly treated separately and distinctly from religion and sociology. All the commentators were not equally interested in the treatment of law even when they happened to be jurists.

The commentaries and the Nibandhas served a very useful purpose in preserving and giving accounts of the different texts as they existed in their respective times. As a matter of fact, many texts would have been absolutely lost to us had they not been referred to or quoted by the different commentators. "The Smriti Candrikā," says Kane, "quotes most profusely numerous Smritikāras and affords valuable assistance in reconstructing some of the Smritis and checking MSS and editions thereof. For example, it quotes about six hundred verses from Kātyāyana on Vyavahāra and about the same number from Brihaspati."[2] As the commentaries thus largely guarantee the original texts, they at the same time reveal the social and political conditions of the time of the commentators rather than the time of the text-writers. In this sense, the commentaries and the Nibandhas, written between 700 and 1800 A. D. will be very helpful in giving an idea regarding the actual administration of the Hindu law during the time referred to above. In this context, the following remarks of Dr. Jolly are very significant regarding the commentators in general and Asahāya in particular: "He (Asahāya) shares with other early commentators

2. History of Dharmaśāstra, Vol. I, P. 344.

of law-books the peculiarity of indulging every now and then in illustrations taken from the everyday life of his period which helped to throw some light on the practical working of Indian Law in these times. As an instance of this tendency I could cite his remarks on a rule concerning liability[3] for debts." The commentaries and the Nibandhas differ from each other both in conception and execution. The former contemplates explantions or interpretations—philological or otherwise, as it is seen when Nanda Paṇḍita in his Dattaka Mīmāṃsā advocates the adoption of daughters on the analogical principles of the institution of the adoption of sons; or when different authorities in Bombay, Madras and Benaras ascribe different shares to sons born after the adoption of a son or when the Mitākṣarā and the Dāyabhāga explain in different ways the selfsame text or rather the selfsame word 'piṇḍa' and thus on this explanation they base their theories which are diametrically opposed to each other. According to Nanda Paṇḍita as there may be twelve kinds of substitutes for the legitimate son, so substitutes of daughters also can be made in an identical way. The word 'putra' includes daughters also. Hence, according to the Dattaka Mīmāṃsā, even daughters could be adopted in as many ways as sons could be affiliated as subsidiary ones, such as, Kṣetraja, Kānina, Gūḍhaja, Dattaka, Kṛitaka and so on. The Sanskrit word 'prajā,' 'santati' and putra' include daughters also. The result is obtained following the rules of Pāṇini in respect of what is known as the Ekaśeṣa compound. According to Pāṇini[4] "the expressions bhrātri and putra are severally inclusive of sisters and daughters." All the words, referred to above, meaning issue or child are used indiscriminately to mean both males and females. The word 'prajā' is derived from 'prajanayati.'[5] Similar is the use of the word 'santati' "Prajā syāt santatu jane." Another synonym of putra is 'apatya' which has been interpreted by Yāska as follows : "apatyam, (offspring) that is, from whom there is exemption from falling into hell, (apatana) or through whom one falls not (patati) into hell."[6] Again Yāska says that the word putra means 'mithuna' or children of both the sexes.[7] Though Nanda Paṇḍita recommends the adoption of daughters to be as meritorious as that of sons, the actual practice of adopting daughters ceased to exist and it was not

3. For the facts of the case and the law points decided therein, see Mahidhara V Sridhara, Sacred Book of the East, Vol. XXXIII, pp. 43-44.

4. 1. 2. 68.

5. Dattaka Mīmāṃsā, VII, 2; translated by Sutherland.

6. *Ibid*, VII, 4, translated by Sutherland.

7. *Ibid*, VII, 7.

recognised by the courts of law[8] except in certain cases of prostitutes and dancing girls on the ground of custom which also must fulfil its necessary conditions of certainty, antiquity, reasonability etc. for its valid recognition. The question again whether such a practice is against the public policy is not quite free from doubt. Again regarding the competition between an adopted son and a subsequently born legitimate son, the Benares, the Bombay and the Madras authorities base their conclusions on the different interpretations of the selfsame text of Vaśiṣṭha which runs thus:

"*Tasmiṃścet pratigrihīte aurasaputra utpadyeta caturthabhāga-bhāgī syāt dattakaḥ.*"

The Bengal authority, however, following the Dattakacandrikā relies on the text of Kātyāyana which stands thus :

"*Utpanne tvaurase putre tritīyāṃśaharāḥ smritāḥ.*"

The relevant text of Manu containing the debatable term piṇḍa runs as follows :

"*Anantaraḥ sapiṇḍo ya stasyatasya dhanaṃ bhavet.*"

The character of the Nibandhas on the other hand implies the review of all the relevant texts and the explanations for the purpose of a synthetic treatment which would attempt to harmonise the diverse views and indicate the most logical and the acceptable one. Thus in a sense the commentaries are comparatively subjective, whereas the Nibandhas are relatively objective. But these characteristics are not rigidly followed in case of the different commentaries and the Nibandhas that we come across in the history of the Hindu law.[9]

2. The nature of interpretation regarding the Sanskrit texts

As it has already been observed, the rules of interpretations played a very important role regarding the whole body of the Smriti literature in general and texts on vyavahāra in particular. As a matter of fact it is by means of this instrument of interpretation that the Hindu law could manage to remain elastic throughout, so that it might easily make itself adjustable to the changed circumstances from time to time. The rules of

8. Chaudhury Padam Singh V Koer Udayal Singh, 12 M, I. A. 537. Now according to the recently codified law, daughters also can be adopted. (Vide the last chapter of this thesis).

9. "........Even when in the earlier part of this period, writers professed to compose only commentaries on particular works; they adopted the style of digests trying to introduce order out of a chaotic mass of Smriti dicta and explaining away apparent contradictions........ In fact there is no hard and fast line of demarcation between a ṭīkā and a Nibandha." History of Dharmaśāstra, Vol. I, P. 247.

interpretation in Hindu law were to a great extent peculiar in comparison with the laws of construction or interpretation in other systems. In the first place, there was a difference in the relative significance between the texts of the Śruti and the Smriti :

"Śruterdvaidhe Smriterdvaidhe sthalabhedaḥ prakalpyate,
Śruti-Smriti birodhe tu Śrutireva garīyasī."

It means that in case of a conflict between two texts of the Śrutis or between two texts of the Smritis, one should assume different cases where they are respectively to apply ; but when there is a conflict between a text of the Śruti and a text of the Smriti, the Śruti shall prevail. In cases of two or more conflicting Smriti texts, in particular, the text that is supported by reason and usage shall prevail——"Smrityorbirodhe nyāyastu to balavān vyavahārataḥ." In the second place, there being an admixture of law and religion in the Smriti literature there was hardly any infallible guide for discriminating between what was strictly legal and mandarory and what was merely moral and recommendatory in nature. In the third place, the responsibility of the interpretors of Hindu law was all the more augmented in view of the fact that interpretation alone was to make the Hindu law actually applicable and profitably workable even under changed environments extending over several centuries. Hence, it is no wonder that the rules of interpretation became quite elaborate and conspicuous even at a very early stage of the Hindu civilisation and culture. All the commentators and Nibandhakāras invariably adopted these canons of interpretation for their own purposes so much so that these interpretations or comments sometimes became more difficult and abstruse than the original texts commented upon.

3. Jaimini and his Pūrvamīmāṃsā

In his Pūrvamīmāṃsā, Jaimini[10] has given elaborate rules of interpretations. These rules of interpretations again have been commented upon most successfully by Śavaraswāmī, Mādhavācāryya and Bhaṭṭapāda. Originally Jaiminis's rules were meant for the interpretation of the Śruti texts only ; but in course of time they were utilised for interpreting the Smriti texts as well. Some of the most general rules of interpretation regarding the conflicts of two texts of the Śruti or two texts of the Smriti or the texts of Śruti and Smriti have just been referred to above.

Injunctions have been classified by Jaimini as either positive or negative. The positive injunctions have again been further subdivided as Bidhi, Niyama, Parisankhyā and Anuvāda, whereas the negative injunctions have been sub-divided as Pratiṣedha or Niṣedha and Paryudāsa.

10. See the relation between Āpastamba Dharmasūtra and Jaimini's Pūrvamīmāṃsā ; Kane, History of Dharmas'āstra, Vol. I, PP. 41-42.

4. Rules having a reason

In connection with the interpretation of the text of Vaśiṣṭha prohibiting the adoption of an only son, Mr. V. N. Maṇḍlik says that according to a canon of Jaimini, a text followed by a reason is not a Bidhi but an Arthavāda. But Mr. Maṇḍlik has misread Jamini's text 'Hetumannigadaḥ'. The correct reading is "Hetuvat" and not "Hetumat." What Jaimini means is that when a text is followed by something which is spoken of in the manner of a reason, the apparent reason is not to be regarded as the actual reason but a mere Arthavāda or recommendatory clause. The force of the injunction is by no means impared thereby, but a sort of additional emphasis is given. As a matter of fact, the Bidhi never becomes an Arthavāda, but the apparent reason becomes so. The stock illustration of a rule having a reason may be taken from the Vedic text—"He should perform the sacrifice with the winnowing basket, because rice is produced by using that article "— Śurpeṇa juhoti tena hi annam kriyate." It might be argued that if reason be given effect to sacrifice might be performed equally with any other instrument of preparing food, such as, cooking span etc. To this Jaimini replies that the above clause is not a reason but is to be taken as a commendation of the article with the object of offering an additional inducement for following the express precept. The net result is that a clause in a Bidhi which looks like a reason has no significance whatsoever. Mr. Maṇḍlik's erroneous contention, though accepted by the Allahabad High Court, in Beni Pershad *Vs* Hardai Bibi, (14 All. 73 F. B.) was finally rejected in appeal by the Privy Council.[11]

The observations of Mayne[12] also are very instructive in this connection :

Atideśa or analogy was allowed in arguments for strengthening a position supported by other grounds. Atideśa alone was never regarded as sufficient for a contention. Double analogy also was not permissible.[13]

5. Discrimination between legal and religious percepts of the Smṛitis

There was undoubtedly an admixture not only of religious and legal matters in the Dharmaśāstras and the commentaries, but also of sacerdotal, domestic and ethical discussions mingled up together. This state of things was noticed from time to time by the judicial tribunals of the British period which could discuss the relevant points in an unbiased and unprejudiced fashion. Thus in Balwant Singh *Vs* Rani Kishori,[14] their

11. Radha Mohan *Vs* Hardai Bibi, 21 All. 460 P. C.
12. Hindu Law and Usage, 9th Edition, p. 36.
13. Gangadhar *Vs* Hira Lal, 20 C. W. N. 498 at page 501.
14. 25 Ind. App. 54 (P.C.)

lordships observed, "All these old text books and commentaries are apt to mingle religious and moral considerations not being positive laws with rules intended for positive laws. In the preface of his valuable work on Hindu Law, Sir W. Macnaghten says : It by no means follows that because an act has been prohibited, it should, therefore, be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible." Again in another[15] case, the Privy Council observed : "No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation."

In a very illuminating article,[16] Tagore Law professor Derrett dicusses certain valuable criteria for distinguishing religious and moral command of the Dharmaśāstras. He begins his discourse by critising the orthodox view that law and religion being inseparably connected in the Hindu Śāstras, neither the king had, nor the modern legislature has, any competence to change or amend the Hindu law and concludes by saying that "interpretation, restriction to circumstances, rarely occurring or flat abrogation, all these methods have been used from time immemorial to accommodate the written texts to the practical needs of the times. In addition, the political authority has in fact supplemented and contradicted the Dharmaśāstra, were it deemed necessary in the public interest............ In these circumstances the cry of "religion in danger" as an obstacle to the reform or re-interpretation of Hindu Law is entirely novel and constitutes a complete innovation."

The same learned professor enumerates certain instances where the injunctions were unenforceable by their nature. The first of these kinds were the precepts like "Be subdued, give and be merciful." In these precepts there is no fixed period within which the command is to be fulfilled and particularly the performance of the precept is intended for increasing the spiritual merit of the individual concerned who might safely choose to be left to attend to his own unseen and unseeable interest. It is undoubtedly true "that unless the injunction is of a nature which does not immediately coincide with natural inclination, it lacks binding (legal and religious) force. On the other hand, it is admitted by all writers that the vyavahāra (business) part of the Dharmaśāstra largely codifies practice and is not unenforceable merely because it coincides with what every body does."

15. 26 Ind. App. 113 (P.C.)

16. A contribution to the proceedings in preparation for the Fourth Conference (1954) of the International Academy of Comparative Law in Section I. D. 2 (Law, Religion and Morals), published in A. I. R. 1953 (Journal Section), p. 52 et seq.

Again the rules enjoining kings to do some duty could not be equally enforceable, as there could not be any trial of the kings for their non-observance of the rules......addressed to the kings "chiefly upon their assumed eagerness to acquire and reluctance to lose spiritual merit." The secret offences and the offences that might have only been 'possibly' or 'probably' committed also could not be legally punished.

There were again certain injunctions that could be enforceable only by the caste-tribunal[17] within certain specified localities at certain specified period. One of the most important observations of professor Derrett is that "both theory and practice departed from the orthodox view and lawyers constantly reviewed in the light of practical needs." The expedients that were utilised for circumventing the written texts were interpretation "which alone could do marvels" and recourse to the theories of "Kalivarjya"[18] "Lokavidviṣṭa"[19] "Āpaddharma"[20] and so on. Again without necessary amendment, the lists of weight, measures and coins found in the Smritis would be really embarrassing in the subsequent ages. It is for this reason that with a very practical insight, Vijñāneśvara suggested the adjustment of the scale of the Smriti to the Vyavahārika or current coinage. "Custom today," says professor Derrett, "once proved and technically not unacceptable can over-ride the text of the Dharmaśāstra—no matter how inconsistent with the policy of the latter. But the "orthodox" here enter a 'caveat' to them as to the Mīmāṃsakas of the late classical period no rule contrary to the tenor of the Dharmaśāstra could be valid either in conscience or in Law. If the Mīmāṃsaka

17. "A wide discretion was given to it and in pre-British times its jurisdiction was as wide, as important and as effective as that of the civil and criminal court. Vijñānes'vara, (Mitākṣarā on Yajñavalkya, III, 300) takes pain to illustrate the powers and duties as well as the constitution of caste-tribunals. One illustration may be of an injunction unquestionably binding in conscience which might have been enforced in certain localities at certain periods but which was certainly not universally enforced. Yajñavalkya (Ist, 159) declares that one should not bathe in water belonging to another without first taking out five balls of mud. The object of this obviously is that when bathing in a tank other than stone-linked tank, one should help to counter-balance the soil falling into it during one's descent into it not to speak of impurities from one's own body. Where permission to bathe has been given by the owner, the need for this conscientious act disappears. The rule is not incapable of being enforced but practice in such contexts must have varied from time to time."

18. Appointment or Niyoga was to be avoided in the Kali age.

19. Giving unequal shares to sons for seniority or sacrifice of cows to Mitra and Varuṇa and similar precepts came to be intolerable to the public and hence, these practices had to be discarded.

20. Āpaddharma indicates certain exceptional circumstances of natural or national calamities when the rules could be relaxed.

Kumārila were asked whether the Southern custom of marrying one's sister's daughter should be tolerated since whole castes including virtuous men learned in the Veda pracrised it, he would at once answer that a custom so flagrantly contrary to the Śāstra could not be practised by the "good men"—whatever their apparent qualifications and that the custom was bad."

He has also thoroughly discussed and copiously illustrated transactions violating an injunction binding in conscience but valid in law; obligations binding in law but not binding in conscience and obligations binding in law but opposed to obligations binding in conscience.

Though the discourse referred to above is very learned, very well-argued and very aptly and amply illustrated, still there are certain points which cannot be wholly acceptable. Thus at one place in discussing the incompetence of the ancient Hindu king to legislate, professor Derrett says : "The same objection would apply to Act of a modern Parliament which institution the author would presumably subject to restrictions not unlike those in vogue in certain predominantly Islamic countries at the present time." Whatever might be the capacities or the incapacities of the ancient Hindu king, his position could never be regarded as analogous to the modern Parliament or Legislature which is purely democratic and representative of the people. Again the so-called objections to the Parliamentary competency were raised only by a particular section of the orthodox population and they never reflected the opinion of the entire population.

Again at another place, he says, "All the injunctions contained in the Smritis are *primafacie* binding since it was universally believed that the authors not only summarised the Veda, but reproduced in practical form parts of the Veda lost since the earliest times. The supposition of a lost Vedic authority as the basis for a Smriti rule is not so absurd as it seems, once one has accepted the fact that at some period in the history of ancient India a break in continuity of tradition occurred. This break had the effect of shaking the public confidence in its own power to innovate and make original research into jurisprudence, among other sciences and this lack of confidence is evidenced by the accepted theory that all knowledge, past, present and future is or was to be found in the Veda. This firm anchorage perhaps saved Indian culture from extinction but has tended to stifle originality."

In the first place, there is hardly any reliable evidence to indicate that there was a "break" in the tradition of the contents of the ancient scriptural literature of the Hindus specially at an early period. When

the theory of the "lost Veda" was enunciated. In the second place, no such theory was necessary from the strictly historical point of view. No code of law particularly at the earliest stages of the human society and civilisation could be exhaustive or self-sufficient. In the third place, it was primarily to emphasise and underline the excellence of the scriptural injunctions which were to guide the destinies of the people in their religious and secular spheres. In the fourth place, it is also not fully correct to say that the originality of the Hindu legal philosophers was actually stifled to any appreciable degree. The different Dharmasūtras and the Dharmaśāstras continued to be composed by the authors extending over several centuries. The contribution of the author of the Arthaśāstra (Kauṭilya) and the different commentators and Nibandhakāras was also by no means negligible. Lastly, the transition form the Śruti to the Smriti does not imply a break in the tradition; it was but a necessary, natural and logical stage in the evolution of the scriptural literature of the Hindus which was conspicuous for its various characteristic features.

The number of commentators and Nibandhakāras on the Smritis is legion. Kane enumerates[21] more than 4500 works and more than 2000 authors of the different kinds of Dharmaśāstras-works. These numbers of course, include the original Dharmasūtras and the Dharmaśāstras. The Mitākṣara[22] also refers to more than 90 Smriti writers by name and six writers of commentaries and Nibandhas. The peculiar names of two of these Smriti writers are Chāgala and Vyāghra. Again the same name has been used with some epithets presumably to indicate different authors, e.g. Vaśiṣtha, Briddha Vaśiṣtha and Brihad Vaśiṣtha and so on. In case of Angiras, the epithets used are Brihat and Madhyama. Raghunandana[23] in his Dāyatattva refers to about 70 works and authors whereas Mitramiśra in his Vīramitrodaya[24] names about 40 works and authors of the Smritis. Many commentaries were themselves commented upon. Again among the commentators and the Nibandhakāras there were some kings and ministers as authors as well as patrons. There was also one commentary on the Mitākṣarā named Balambhaṭṭi which was ascribed to a lady named Lakṣmīdevī. In the present chapter only the important works of commentary and Nibandha and their authors chiefly dealing with vyavahāra will

21. *Ibid*, Apperdix A and Apprendix B PP. 503-760. Cf. Catalogue of Sanskrit MSS in the Bodleian Library at Oxford by Dr. Aufrecht (1864). The catal gue of printed works in the British Museum Library brought up to 1928.

22. See Kane's History of Dharmas'āstras, Vol, I, p. 288.

23. *Ibid*, p. 418.

24. *Ibid*, p. 618.

be discussed one by one to indicate the special contributions made by each of them in the development of the Hindu law.

6. Asahāya

From several references and cross-references[25] it appears that Asahāya was the earliest commentator regarding whom some reliable informations are available. Viśvarūpa (9th century A.D.[26]) mentions Asahāya by name while commenting on Yājñavalkya (III, 163-4) and quotes one explanation of Asahāya on Gautama (XXII, 13). The Hāralatā[27] of Aniruddha also (12th century A.D.) refers to the explanations of Asahāya on Gautama and in one case rejects the view of Asahāya regarding the cessation of Sapiṇḍa relationship in the following words: "Gautamaḥ—piṇḍanivrittiḥ saptame pancame vā (Gautama Dharmasūtra, XIV, 12). Atrāsahāya vyākhyā: Yadā pitripitāmahaprapitamahāstrayo jīvanti tadā prapitāmahādūrddhvam tribhyaḥ piṇḍadānam.................idamtu vyākhānam na, śobhanamiti.[28]" According to the Mitākṣarā (12th century A.D.) on Yājñavalkya (II, 124) the opinion of Asahāya and Medhātithi (10th century A.D.) on the right of an unmarried sister to one-fourth share from her brothers is preferred to that of Bharuci (10 century A.D.)........... "ato Asahāya-Medhātithi probhritīnām vyākhyānameva caturasram na Bhāruceḥ." The Sarasvatīvilāsa[29] and the Vivādaratnākara[30] also refer to the Asahāya-bhāṣya on Manu. The Smriti Candrikā[31] refers to one Nāradabhāṣyakāra without naming him. This unnamed commentator must be Asahāya. From the above it is clear that Asahāya wrote commentaries on Gautama, Manu as well as Nārada and he must have flourished in the 8th or 9th century A.D. From Asahāya's reference to the case of Śrīdhara V Mahīdhara no reliable conclusion can be drawn regarding the time of Asahāya who held the same view as the Mitākṣarā regarding the definition of the term dāya[32] and the impartibility of lands,[33] given to a Brahmin having sons by a Kṣatriya

25. They have been found to be very helpful in determining the relative chronology of the different commentators and Nibandhakāras which can be ascertained within narrow limits unlike that of the authors of the Dharmasūtras and the Dharmas'āstras.

26. Vide, supra.

27. P. 35.

28. *Ibid*, p. 97.

29. Mysore Edition, pp. 348, 371, 384, 520.

30. P. 583......"Atrasāhāyenoktaṃ puṃsām sati bhrātrije strīṇām sapatnīputre kṣetrajādayaḥ pratinidhayona kartavyā iti."

31 P 36.

32. "Asahāyāvijñānyogiprabhritīnām tu yat svāmisambandhādeva nimittādanyasya svam bhavati tad dāyas'abdenocyate iti" (Sarasvatī Vilāsa, Para 19).

33. *Ibid*, p. 371.

wife. He was in favour of giving some shares to the step-brothers along with the full brothers in case of succession to the Śulka of a woman.[34] He also enumerated the order of succession of the heirs of a childless Brahmin as the teacher, teacher's son, teacher's widow, the pupil, pupil's son, pupil's widow and lastly the fellow student.[35]

7. Viśvarūpa

The earliest commentator on Yājñavalkya was Viśvarūpa whose commentary was known as the Bālakrīḍā. He has been referred to by the Mitākṣarā as a very voluminous expositor. Mr. Sītārām published from Madras a translation of Viśvaūrpa's commentary on inheritance and Mr. Setlur also published the section on vyavahāra which was really quite meagre in comparison with the chapters on ācāra and prāyaścitta. He flourished in the 9th century A. D. Though Viśvarūpa and Vijñāneśvara have both commented upon Yajñavalkya, still there has been a considerable difference in their views which have been pointed out by Kane in a masterly way[36] :

From the above points of contrast between Viśvarūpa and Vijñāneś-vara, it will clearly follow that in most of the cases the interpretations of the text of Yajñāvalkya by the former were much more liberal than those of the latter......nay even those of Jīmūtavāhana. Vijñāneśvara imposed many important restrictions to the otherwise liberal views of Yājñāvalkya as it has been pointed out by Jayaswal in his Tagore Law Lectures on Manu and Yājñavalkya. Regarding the unequal distribution among the sons by the father, Aparārka and Śūlapāṇi appear to agree with Viśvarūpa whereas Jīmūtavāhana and Mādhava follow the view of Vijñāneśvara. Jīmūtavāhana specifically lays down certain circumstances under which an unequal division might be permitted and holds that where these do not exist, the division is void. Viśvarūpa's recognition of the rights in behalf of widows of predeceased sons and grandsons might be compared with the provisions of the Hindu Women's right to Property Act (Act XVIII of 1937, as amended by Act XI of 1938). Similarly Vijñāneśvara has given an unduly narrow interpretation of the expression

34. "Atas'ca kanyās'ulkaviṣaye sodarāsodaravibhāgeosodarāṇāmapi kiñciddeya mityasahāya vyākhyānamasahāyam." *Ibid*, p. 384. It is interesting to note the pun on the words Asahāya ; the first undoubtedly refers to the commentator and the second word means "untenable" or "unsupportable " The interpretation of the term 'Asahāya" as an adjective of Medhātithi, as suggested by the Balambhaṭṭi cannot be accepted.

35. Sarasvatī Vilāsa, Para 68.

36. History of the Dharmas'āstra, Vol. I, p.p. 259-60.

"pitridravyāvirodhena." The interpretation suggested by Aparārka and Jīmūtavāhana are quite liberal though the Vīramitrodaya and the Mayūkha follow the Mitākṣarā on this point. Vijñāneśvara confounds Niyoga with betrothal; but in some cases again his interpretations are more liberal than those of Viśvarūpa. This can be illustrated with reference to the denotation of strīdhana, the meaning of the word duhitā and right of succession by a woman as noticed in the points of contrast indicated by 7, 8 and 10 of the quotations above.

8. Bhāruci

Bhāruci was mentioned by the Mitākṣarā and as such he must be supposed to have flourished before 1050 A.D. On Yājñavalkya, II, 124, the Mitākṣarā prefers the views of Asahāya and Medhātithi to that of Bhāruci regarding the "fourth share" to be given to unmarried sisters from those of the brothers.[37] But according to the Parāśaramādhavya and the Sarasvatīvilāsa Bhāruci was of opinion that the unmarried sisters were only entitled to provision for their marriage and were not entitled to a fourth share: Bhārucistu caturthabhāgapadena vivāhasaṃskāramātropayogidravyam vivakṣitam, ato dāyabhāktvaṃsamaskritakanyānām nāstīti manyate."[38] On many points of law, Bhāruci differed from Vijñāneśvara. The terms dāya and vibhāga have been differently interpreted by them. Again Bhāruci recommended Niyoga for a childless widow whereas Vijñāneśvara prohibited it for all classes of widows without any discrimination whatsoever. Bhāruci, like Viśvarūpa, did not refer to the distinctions between "sapratibandha" and "apratibandha dāya"; according to Bhāruci and Viśvarūpa when a coparcener concealed any joint property, he was not guilty of theft; but according to Vijñāneśvara he was liable for theft.[39]

9. Śrīkara

Śrīkara was referred to by the Mitākṣara[40] in connection with his view that a widow could succeed as an heir to her husband only when the property was small. But this view of Śrīkara was not acceptable to the Smritisāra[41] of Harinātha and the Mitākṣarā[42]; Śrīkara's views agree more

37. See ante Chapter VIII.

38. Parāsʹaramādhavya, Vol. III, p. 510.

39. For more examples and details see the Journal of the Bombay Branch of the Royal Asiatic Society for 1925, pp. 211-13

40. On Yājñavalkya, II, 135—Etenālpadhanaviṣayatvaṃ Śrīkarādibhiruktam nirastam veditavyam.

41. India Office Catalogue No. 301, Folio. 128 a.

42. On Yājñavalkya, II, 169; See also Sarasvatīvilāsa (Mysore Ed.)

with the views of Viśvarūpa and he has not been mentioned by Medhātithi and Viśvarūpa. In all probability he belonged to the ninth century A.D. Śrīkara was, however, more copiously quoted by Jīmūtavāhana, the Smriticandrikā and the Sarasvatīvilāsa. The Rājanīti Ratnākara of Caṇḍeśvara ascribes one very peculiar view to Śrīkara among others according to which the poor and the helpless are entitled to a share of the royal wealth.[43] Jīmūtavāhana very severely criticised some of the views of Śrīkara regarding the succession of re-united brothers, the gains of learning, prescription and adverse possession.[44] Again according to the Smritisāra, Śrīkara probably as a writer from Mithila advocated the theory of spiritual benefit[45] as the guiding principle in ascertaining the superior claims of succession.

10. Medhātithi and Bhojadeva

Mednātithi is the oldest commentator on the Manu-Smriti and his commentary is known as the Manubhāṣyam. "Its aim" says Bühler,[46] "is to show the general sense of Manu's dicta, to elucidate all really difficult passages and to settle all doubtful points by a full discussion of the various possible interpretations and of the opinions advanced by others......Moreover he frequently enhances the value of his explanations by illustrating Manu's rules by instances taken from everyday life. He was copiously quoted by several authors including Vijñāneśvara, Kullukābhatṭa and Lollaṭa, as an eminently authoritative writer flourishing in the 9th century."[47] Medhātithi[48] holds some peculiar views on the law of adoption and offers an altogether new explanation of the word 'pati'[49] in the famous verse "naṣṭe mrite etc."; but his views have not been accepted. Himself a very eminent author of many famous works on various branches of knowledge, Dhāreśvara Bhojadeva was the most famous Indian king as a patron of learning and learned men. He flourished in the later half of the tenth century A.D. and reigned throughout the first half of the eleventh century A.D. So far as law is concerned, Bhojadeva held some peculiar views different from those of Vijñāneśvara. Thus according to this king-patron

43. Rājanīti Ratnākara, pp. 49-41. (Ed. by Jayaswal).

44. Vyavahāratattva, p. 47

45. India Office Catalogue No. 301, Folio 147 a.

46. Introduction, Sacred Book of the East, Vol. XXV, p. 119.

47. For the discussion of the date of Medhātithi, see Bühler's Introduction to the Sacred Book of the East, Vol. XXV, pp. 121-126 and Kane's History of Dharmas'āstra, Vol. I, p. 275; Journal of the Bombay Branch of Royal Asiatic Society, 1925, pp. 217-21.

48. Medhātithi allowed a Brahmin to take a Kṣatriya boy in adoption (on Manu, IX 168).

49. The word 'pati' has been used in the etymoligical sense and a woman in cases of calamities, referred to, might choose another man as her protector through service.

author, a widow[50] could succeed as an heir provided her husband was separate and she was willing to submit to Niyoga. Again Bhojadeva placed the paternal grandmother immediately after the mother as an heir even before the father. Again according to him ownership was based on the Śāstras, as against the theory of Laukika[51] ownership, advocated by the Mitākṣarā. It was also held by Dhāreśvara that the word duhitaraḥ in Yājñvalkya meant putrikā[52] in the technical sense of the term in the order of succession.[53]

50. The Mitākṣarā on Yājñavalkya, II, 145.

51. Vīramitrodaya, pp. 526-528.

52. Smriti Candrikā, Vol. II pp. 295-96.

53. For further details regarding the other views of Bhojadeva agreeing with and differing from those of Vijñānes'vara, vide Kane's article on Bhojadeva in J.B.B.R.A.S. for 1925. pp. 223-24.

BOOK III

Muslim Period (1100 A.D. to 1772 A.D.)

CHAPTER IX

The Nibandhas and the Commentaries : The later works

1. Introduction

The discussion regarding the commentaries and Nibandhas has been distributed over two chapters. Chapter VIII comprises the general discussion regarding the peculiar features of this type of literature with special reference to some of the earliest works; the present chapter has been devoted to the later works on the subject. The principle of this classification has been primarily based on chronology in the sense that the earlier works were covered by the Hindu period and the later works have been placed in the Muslim period. Most of the works of the later group were composed during the Muslim period. Though in some cases it could not be quite possible to ascertain the exact time when the authors of some particular works flourished, yet some sort of broad division could be possible. The main difficulties on this question was that no hard and fast line could be determined regarding the establishment of the of Muslim rule in India or the beginning of its exact influence on the different types of Hindu literature in general and the commentaries and the Nibandhas in particular. Undoubtedly, there was a considerable period of transition between the Hindu period and the Muslim period. The legal literature and the legal institutions of the Hindus also were more or less influenced by this rather uncertain period of transition. But with the consolidation of the Muslim rule in India, the Hindus could realise their own position in relation to the principles and institutions of their own law and society. When thus the Muslims came to establish themselves in India, the Hindus also more and more felt the necessity of re-asserting and re-emphasising their own rules and regulations, enunciated by their more or less scriptural literature, in the shape of the Dharmasūtras and the Dharmaśāstras. The commentators and the Nibandhakāras had thus a special responsibility and obviously the role played by them could succeed in saving their own law and culture to a very considerable extent when they happened to come in contact with strangers with altogether different religion and customs

and manners. In this connection the observations of Kane[1] are very suggestive.

The chronological difficulties experienced in the transition between the Hindu period and the Muslim period are to be equally seen in the similar period in between the Muslim rule and the British rule in India, at least in theory upto 1858. Many important judicial systems and reforms began to be introduced into India from the very first quarter of the 17th century when India was destined to witness the foundation of the Company's factory in Surat and the facilities granted to Sir Thomas Roe by the Mughal emperor Jahangir in 1615 according to which the English people were allowed to be governed by their own laws *inter se*. The introduction of the British elements increased more and more during the subsequent periods. Thus though the Mughal rule in India finally came to an end only in 1858, many important judicial reforms were ushered in long before that date. Thus the difficulty is felt as to which date should be taken as the boundary line between the Muslim and the British rule in India for the purpose of Indian Legal History in general and the Hindu Legal History in particular. Taking into consideration the important development that took place in India from the standpoint of legal history since the assumption of Diwani of Bengal, Bihar and Orissa by the Company in 1765, one may be justified in being inclined to point to the years 1772. 1773 and 1774 as the important land-marks so far as the British administration of justice in India is concerned.

There are, of course, certain points of difference between the first transitional period between the Hindu rule and the Muslim rule and the second transitional period between the Muslim rule and the British rule. Regarding the first period, sometimes reliable data and informations concerning certain works are not available, but this is not true of the second period.

Reference may be made in passing to some of the peculiar views on law held by Devasvāmin, Jitendriya, Bālaka, Bālarūpa, and Yogloka—all of whom flourished in the later half of the 11th century or the first half of the 12th century A.D. Devasvāmin explains the word Yautaka differently from the Nighanṭu.[2] A son born to one of several full brothers or co-wives, was to be treated as a son for all the brothers and the wives and as such no adoption could be made.[3] He also agreed with Bhojadeva

1. History of Dharmas'āstra, Vol. 1, P. 467.
2. Smriti Candrikā, 11, P. 285.
3. *Ibid*, II, p. 289; Sarasvatī Vilāsa, P. 304; Dattakamīmāṃsā, P. 42.

regarding the meaning of the word duhitaraḥ.[4] According to Jitendriya a man taking another's gold believing it in good faith to be iron or his own cannot be guilty of theft.[5] The peculiar view of the Dāyabhāga regarding the succession of a widow under all circumstances was already expounded by Jitendriya.[6] According to him "gains of learning," "maitra," and "audvāhika" are not subject to partition. Bālaka held the view that a daughter's son could come in as an heir only after the failure of the heirs from the widow of the brother.[7] Gains of learning were not subject to partition according to Bālaka also.[8] He agrees with Śrīkara and others regarding prescription and adverse possession.[9] According to Bālarūpa, unmarried daughters were preferred to married daughters for succession to the wealth of a sonless man. In explaining the text of Hārīta that a quarrelsome wife (Karkaśā) should be entitled only to maintenance, Bālarūpa says that the reference is to the widow of a re-united coparcener.[10] But this is doubtful. He mentions Bandhus and classifies them as Ātamabandhus, Pitribandhus and Mātribandhus in order of preference.[11] According to Yogloka 20 years' adverse possession could give title in respect of immovable property. In this respect, he agrees with the views of Śrīkara, Bālaka and others.[12] According to him in a case where a man accused or suspected of theft threw down the challenge that even if one out of the several items of property charged were brought home to him as alleged to have been stolen by him, he would be compelled to restore all the items charged with.[13]

2. Vijñāneśvara

The Mitākṣarā is the best and best known commentary by Vijñāneśvara on Yājñavalkya. It occupies a unique position in the history of Indian legal literature. Subject to the authority of the Dāyabhāga in matters of inheritance, partition etc. in Bengal, the Mitākṣarā applies to the whole of India particularly from the time of the British administration. For this wide prevalence and almost universal acceptance, the very nature

4. Smriti Candrikā, II, 295.
5. Dāyabhāga, p. 450 (Ed. of 1829).
6. *Ibid*, p. 256.
7. *Ibid*, p. 282.
8. *Ibid*, p. 190.
9. Vyavahāratattva, p. 223.
10. Vivādacintāmani, p. 152.
11. *Ibid*, p. 155.
12. Vyavahāramātrikā, p .302.
13. Vyavahāratatta, p. 217. "Na ca yadyeṣām madhye ekamapi mayā grihītam vibhāvayasi tadā sarvameva dātavyamiti pratijñā........"

of the Yājñavalkya Smriti which has been commented upon must be largely responsible. It was not a mere accident or chance. The intrinsic merit of the Yājñavalkya Smriti attracted commentators who in their turn made the content of the Smriti in question easily understandable and acceptable to the people.[14] In this respect a very instructive antithesis is to be found between the two most important Smritis of Manu and Yājñavalkya. The Manu Smriti was, no doubt, regarded as the greatest Smriti particularly by the foreigners; the Smriti-writers themselves also extolled the Manu Smriti.[15] This was, however, more than compensated[16] in favour of Yājñavalkya by the commentators, such as, Viśvarūpa, Vijñāneśvara and others. The above observation, however, should not be treated as minimising the importance of the commentator Vijñāneśvara himself. The several commentaries on his commentary bear eloquent testimony to its eminence and generality. "The Mitākṣarā was composed in the last quarter of the 11th century A. D. or the first quarter of the 12th century A. D. and it was not only a commentary—explanatory of the verses of Yājñavalkya, but it is in the nature of a digest of Smriti material. It brings together numerous Smriti passages, explains away contradictions among them by following the rules of interpretation laid down in the Pūrvamīmāṃsā system, brings about order by assigning to various dicta their proper scope and province and effects a synthesis of apparently disconnected Smriti-injunctions."[17] Reference may briefly be made to the most important doctrines enunciated or advocated by the Mitākṣarā. In the first place, it means by the term 'piṇḍa' body and by the term 'sapiṇḍa' it means blood-relations or relations connected through propinquity; in the second place, consanguinity is the guiding principle in determining the order of succession; in the third place, it makes the important distinction between 'sapratibandha dāya' and 'apratibandha dāya' and in the fourth place, sons, grandsons and great grandsons were made joint owners in the ancestral property by virtue of their birth, with the exclusion of many cognates from inheritance altogether. Against all these important

14. See ante, Chapter VI.

15. (a) Yājñavalkya himself names Manu as the first of the Smriti writers in his well known enumeration of the authors of the Smritis.

(b) Brihaspati says in his last chapter......"Manvarthaviparītā yā sā smritirna pras'asyate."

(c) Angiras, as quoted by the Smriti Candrikā says:

' Yat pūrvam Manunā proktam dharmas'āstramanuttanam
Na hi tat samatikramyaṃ vacanam hitāmātmaṇaḥ."

(d) Parās'ara also says, "Manunā caivamekena sarvas'astrāṇi jānatā." (Chapter IX).

16. Kane, History of Dharmaś'āstra, Vol. I, pp. 288-90,

17. *Ibid*, pp. 287-88.

doctrines of the Mitākṣarā, the doctrines of the Dāyabhāga militate.[18] In this respect Vijñāneśvara[19] on many occasions restricted the explanations offered by Viśvarūpa.[20]

4. Jīmūtavāhana

Jīmūtavāhana was one of the most famous Indian jurists, comparable in respect of eminence and popularity with Vijñāneśvara who preceded him at least by two hundred years.[21] His position was unique in Bengal as his authority was undisputed there particularly in points of inheritance, partition, strīdhana and re-union etc. wherein even the Mitākṣarā was to yield to the Dāyabhāga which was supposed to have been written by way of revolt against many artificial and sometimes even absurd principles of inheritance based on the theory of propinquity. Conscious of the limitations and shortcomings of Vijñādeśvara's doctrines, Jīmūtavāhana propounded the theory of spiritual benefit for the governance of the rules of succession. The immediate benefit of this new doctrine was the inclusion in the list of heirs of many cognates who would otherwise be excluded on the basis of the mainly agnatic theory of Vijñāneśvara. Further support was lent to this theory by the consideration of natural love and affection. In fact this feature at once appealed to the people at large who ungrudgingly and readily accorded their recognition and acceptance to the theory advocated by Jīmūtavāhana. The other fundamental conceptions of Vijñāneśvara were equally assailed and the result was revolutionary in Bengal. Jīmūtavāhana could succeed wonderfully only because he struck at the most opportune moment by appealing to the most popular sentiment of having property for the really near and dear ones. The two Jīmūtavahana's works dealing exclusively with law are his Vyavahāramatrikā and the D yabhaga. The former deals with the general law of procedure or adjective law including topics on the titles of law, the appointment of judges, constitution of the different courts and the different stages of litigation along with the various means of proof etc. It is very significant to note that though the author refers to two kinds of proof human and divine, still he does not deal with the ordeals.[22] The

18. For Jīmūtavāhana, see supra.

19. For details and comments see ante (Vis'varūpa).

20. India Office MSS, Folio 95.

21. For the discussion about the time of Jīmūtavāhana, see Kane, History of the Dharmas'āstra, Vol. I, pp. 325-327.

22 Even at the present time many kinds of so-called ordeals are actually applied in cases of theft and other offences. Thus Bāticālān (cup movement), winnowing-basket-incantation (Kulāpaḍā) are sometimes resorted to by the village peoples with occasional success.

reason might be that on account of he prevalence of the secular element in law and the administration thereof, appeals to the supernatural died their natural death. By far the most important juristic work of Jīmūtavāhana is his Dāyabhāga which sets forth the most striking legal theories militating against those of Vijñāneśvara.[23] According to the fundamental theories of Jīmūtavāhana, sons cannot have any interest in the property by birth or during the lifetime of their fathers, nor can they effect partition during the lifetime of their fathers unless they become "patita" or "sannyāsins" or unless the fathers so desire; a widow would inherit her husband's property even though the husband might be joint with his brother and lastly the principle of inheritance was to be governed by the doctrine of spiritual efficacy instead of propinquity. For his theory, he refers to the views of Niravadyavidyoddyota.[24] No particulars are known about this author.

5. The Mitākṣarā and the Dāyabhāga contrasted

The Mitākṣarā was the earlier of these two most important commentaries on Hindu law. It was composed about the close of the 11th century or the beginning of the 12th century. As regards ancestral property the Mitākṣarā recognised the right by the very birth; thus a son is regarded as a co-owner with his father from his very birth. According to this school again a father has got only a restricted power of alienation and a son can claim partition even against the father. The Mitākṣarā makes a distinction between "Apratibandha dāya" and "Sapratibandha dāya," the former applying to ancestral property and the latter applying to self-acquired property. Regarding "Sapratibandha dāya" the position of a Mitākṣarā father is exactly the same as that of a Dāyabhāga father. The interest of a member of the joint family property passes by the doctrine of survivorship to the other members. As regards alienation, member of a Mitākṣarā family cannot dispose of their shares while undivided. The principle of inheritance in this school is consanguinity or propinquity or blood-relationship. But cognates are postponed to agnates. The doctrine of *factum valet* has been recognised in this school only partially.

In the Dāyabhāga school on the other hand, right to property accrues by death of the last owner. Hence, a son cannot have any share in the ancestral or self-acquired property until the death of the father. There is no distinction herein between the "Sapratibandha dāya" and the "Apratibandha dāya." In all cases the dāya is "Sapratibandha"—independent

23. For comments, see Chapter VIII.

24. The word "uddota" has been used in the sense of "chapter" in the famous work "Madanratnapradīpa."

of the question whether the property is ancestral or self-acquired. A father, therefore, has got an absolute power of alienation and a son can not claim partition or even maintenance as a matter of right. The interest of every member would pass on his death to his own heirs like widow or daughter according to the rules of inheritance. Even an undivided member of a joint family can sell or give away his share. The principle of inheritance is based on the theory of piṇḍa or spiritual efficacy. Some cognates are preferred to many agnates. The doctrine of *factum valet* is fully recognised in the Dāyabhāga school.

One of the most important points of difference between the Mitākṣarā and the Dāyabhāga school is in respect of the connotation of the term strīdhana. The Mitākṣarā derives the meaning of the term Strīdhana from the following text of Yājñavalkya :

"Pitrimātripatibrātridattamadhyagnyupāgatam
Ādhivedanikādyanca strīdhanaṃ parikīrtitam."

Vijñāneśvara[24a] says : "That which was given by the father, by the mother, by the husband or by a brother and that which was presented by the maternal uncles and the rest at the time of wedding before the nuptial fire; and a gift on second marriage or gratuity on account of supersession and as indicated by the word "Ādya" (and the rest), property obtained by (1) inheritance, (2) purchase, (3) partition, (4) seizure, e.g. adverse possession, (5) finding—all this is strīdhana according to Manu."

It can be clearly seen that the first portion of the above definition is taken from the definition of strīdhana as given above by Yājñavalkya. The second part, however, is an expansion of the word "ādya" by Vijñāneśvara. This word occurs in Yājñavalkya's difinition[24a] "so as to include in strīdhana five distinct kinds of property which were not recognised as strīdhana by the early sages. Neither Manu nor the other sages ever recognised these kinds of property as strīdhana. Manu recognised only six kinds of strīdhana ; but this Vijñāneśvara explains by saying that all that was meant by Manu's text is that the number cannot be less than six not that it cannot be more than six. And further he expressly says that the term strīdhana conforms in its import with its etymology and is not technical. The result is that according to the Mitākṣarā property of any description belonging to a woman is strīdhana. It may be a gift from relations or a gift from strangers. It may be property acquired by inheritance or property obtained on partition. It may be her earnings or it may be property acquired by her from any other source. (Mitākṣarā, Chapter II, Section 11, Paras, 2-4)."

24a. See Mulla's Hindu Law, p. 114.

Among other Smriti texts Jīmūtavāhana relies on the following two texts of Kātyāyana for the definition and disposition of strīdhana property :

"Prāptaṃ śilpaistu yadvittam prītyā caiva yadanyataḥ
Bhartuḥ svāmyaṃ bhavettatra śeṣaṃtu strīdhanaṃ matam.
Aputrā śayanaṃ bhartuḥ pālayantī gurau sthitā
Bhunjītāmaraṇāt kṣāntā dāyādā ūrddhvamāpnuyuḥ".

Commenting on the first of the above texts, the Dāyabhāya says that the term strīdhana has a technical meaning, viz, that it means the absolute estate of a woman. While commenting on the second text, it says that over the property inherited by a widow from her husband, the wife has got only a limited interest. This latter interest is called woman's estate. Jīmūtavāhana alters[24a] the text of Yājñavalkya by substituting the expletive 'eva' for 'ādya' so as to confine the term strīdhana to the kinds of property specifically enumerated by Yājñavalkya. Naturally he does not accept the definition as given in the Mitākṣarā and defines strīdhana thus :

"That alone is strīdhana which she (a woman) has power to give, sell or use independently of her husband's control."

Jīmūtāvāhana, however, does not say what kinds of property can be disposed of by a woman without her husband's consent, but immediately after defining strīdhana, he cites the texts of Kātyāyana and Nārada."

Thus affirmatively speaking, all gifts from relations constitute strīdhana except a gift of immovable property made by the husband ; and gifts from strangers also constitute strīdhana if made before the nuptial fire or at the bridal procession ; again negatively speaking, the following properties cannot be regarded as strīdhana :

1. Property inherited by a woman ;
2. Property obtained by her on partition ;
3. Gifts from strangers except those made before muptial fire or at the bridal procession ;
4. Property acquired by her through mechanical arts. (Dāyabhāga, Chapter IV, Section I)

Now although it is contended by Vijñaneśvara that property inherited by a woman from a man is to be regarded as her strīdhana, yet nowhere does he mention that such property becomes her absolute estate. On the contrary, in view of the texts of Kātyāyana and Yājñavalkya as well as the general doctrine of the Mitākṣarā according to which even males are not entitled to any absolute ownership in certain types of property, it is only reasonable to hold that a female who has inherited a

24a. Vida Mulla's Hindu Law, pp. 119 *et seq.*

property from a male holds it subject to certain restrictions and limitations although such property may be styled strīdhana by the Mitākṣarā. On these among other grounds the Privy Council[25] observes that it would be misleading to use the term strīdhana in the general sense and it would be convenient even in the Mitākṣarā provinces to confine that term to the absolute property of a woman as in the Dāyabhāga which describes the limited interest of a woman by the phrase woman's state.

6. Aparārka

Aparārka was the author of the Aparārka-Yājñavalkya Dharma-śāstra-Nibandha, a commentary or rather a digest, as the very name implies. He was a Śilahāra king and profusely quoted from the Grihya-sūtras and the Dharmasūtras. In his treatment of law some of the views are similar to those of Jīmūtavāhana's and some others are similar to Vijñāneśvara's. From epigraphical and other data, it appears that he flourished in the 12th century[26] A. D. Like Jīmūtavāhana, he also advocates the spiritual benefit as the guiding principle to determine the superior claims of succession.[27]

7. Devānandabhaṭṭa

Devānandabhaṭṭa belonging to Southern India wrote a very extensive commentary styled Smriti-candrikā quoting[28] profusely from numberless authors, criticising their views and offering his own dicta. This work has been rightly regarded as a very high authority[29] on law subject to the provision of the Mitākṣarā.[30] He deals with the adjective law, the constitution of the courts, the different stages and aspects of litigation and the different titles of law including debt, deposit, partnership, succession etc. Though duly respectful towards the general theory of the Mitākṣarā, that a son acquires by birth ownership in the ancestral property, still he criticises many views of the Mitākṣarā in details. The Smriti-candrikā does not accept the definition of the word "dāya"[31] as given by the Mitākṣarā. It also does not countenance the view of the latter that the father should not be allowed to make unequal distribution

25. Thakur Deyhee V Rai Baluk Ram, (11 M M. I. A. 139); Bhugwan Deen Dobey V Myna Baye, (11 M. I. A 487); Debi Mangal V Mahadeo, (34 All. 234 P. C.)

26. Kane, History of Dharmas'āstra, Vol. I, pp. 330-34.

27. Pp. 744-745.

28. As already noticed, this procedure served a very useful purpose in preserving and locating many old texts.

29. I. L. R. 3 Mad. 290 (P. C.) 302, I; I. R. 44 Mad. 753 (P. C.)

30. I. L. R. 3 Mad. 265-269; I. L. R. 35 Mad. 160.

31. Smriti-candrikā, II, pp. 267-68.

of the ancestral property or that the mother should be preferred to the father in the case of succession to the property of a deceased son. The Smriti-candrika enjoins that both the parents should succeed together[32] and it advocates spiritual benefit as the guiding principle of succession.[33] In his introduction, the author makes a very significant assertion saying that he will always base his discussion on authoritative texts and never on fiction. He flourished probably in the 12th century A.D.

8. Caṇḍeśvara

Caṇḍeśvara wrote a very extensive digest, namely, Smriti-ratnākara which consists of seven sections two of which were styled the Vyavahāra-ratnākara and Vivāda-ratnākara, the former dealing with the general law of procedure, the different stages of litigation, the different means of proof and judgment and the latter dealing with the 18 different topics of law on civil and criminal jurisprudence. Caṇḍeśvara inspired the other authors who based their works mainly on the Smritiratnākara. The Vivādacintāmani of Vācaspati Miśra is one such work. The Vivādaratnākara of Caṇḍeśvara and the Vivādacintāmani of Vācaspati Miśra constitute the two most important authorities in Tirhut, subject to the general provisions of the Mitākṣarā. Much about the personal history of Caṇḍeśvara is known from his works; he was a minister and a Chief Justice[34] under a Mithila King.[35] He flourished in the 14th century A.D.

9. Mādhavācāryya

Mādhavacāryya was the most eminent jurist of Southern India and his work Parāśaramādhavya was regarded as a high authority[36] on Hindu law in the South. Much can be known about the personal history[37] of Mādhavācāryya who was a brother of the great Sāyanācāryya. He was an erudite scholar, a far-sighted statesman and the bulwark of the Vijaynagar kingdom in its formative period. In the old age he became a sannyāsin.[38] "The original Smriti of Parāśara contains no verses on

32. *Ibid*, II, p. 297.
33. *Ibid*, II, p. 295.
34. Mitra's Notices. Vol. VI, pp. 67, 135.
35. In an introductory verse of the Rājnītiratnākara it is said that the book was written by Caṇḍeśvara at the command of the king Bhaveśa or Bhaveśvara.
36. I. L. R. 35 Mad. 152-156 : 2 Mad. H. C. R. 206, 217.
37. "Śrīmatpūrvapaścimadakṣiṇasamudrādhīśvarakamparājasutasaṃgamarāja mahāmantri māyanputramādhavasahodarasāyanācāryyakritā Mādhaviyā vrittiḥ". (The Colophon of the Mādhavīya dhātuvritti).
38. Epigraphia Carnatica, Vol. VI, Koppa 30.

Vyavahāra, but Mādhavācāryya "hangs on the slender peg of a single verse of Parāśara calling upon the king to rule his subjects with righteousness, in his treatise on Vyavahāra that covers a little over a fourth part of the whole commentary."[39] The work is not a commentary on Parāśara only, but it is virtually a digest on civil and more of religious law. He flourished in the 14th century A.D.

10. Viśveśvarabhaṭṭa

Viśveśvarabhaṭṭa is one of the leading authorities on Hindu law according to the Benares School.[40] He wrote several books under the patronage of the king Madanapāla. One of these works is Madanpārijāta which deals with Vyavahāra in one of its nine chapters. Another work is the Subodhinī which is a commentary on the Mitākṣarā. The Vyavahāra portion of this commentary was published in Bombay by S. S. Setlur and J. R. Gharpure. According to the introductory verses to the Madana pārijāta, Viśveśvara is the son of Pedibhaṭṭa and Ambicā. One of the grantees in the Biṭrāguṇṭa[41] grant made by the king Saṅgama, dated 1356 A.D. is also Pedibhaṭṭa. Biṭrāguṇṭa is in the Nellore district. Hence, it appears that Viśveśvara was originally a native of the Drāviḍa country and that later on he migrated to Northern India in search of patronage after he has composed his first work Subodhinī, already referred to. He flourished in the 14th century A.D.

11. Śūlapāṇi

Śūlapāṇi is an eminent authority on Dharmaśāstra. His Dattakaviveka, as the very name implies, discusses the law on adoption in all its aspects. The law of inheritance[42] has been dealt with by him in the Dāyabhāga section of his Dīpakalikā.[43] On matters of inheritance, Śūlapāṇi holds some peculiar views. Thus the texts according to which parents are preferred to the brothers of the deceased in succession refers according to him to the property acquired from the father or the grandfather. The term 'apratiṣṭhita' has been explained in the same way, as it has been done by Aparārka, Jīmūtavāhana and the Smṛticandrikā. He also preferred a full brother, though not re-united, to a half brother though re-united..."asaṃsrisṭo'pi sodara eva gṛhṇīyāt, na tu saṃsṛṣṭaḥ-

39. Kane, History of Dharmaśāstra, Vol. I, p. 375. see also ante, Chapter VIII on Parāśara.
40. I.L.R. 16. Calcutta, 367.
41. Epigraphia Indica, Vol. III, p. 28.
42. On Yājñavalkya, II, 114-149.
43. Ghose's Hindu Law (Ed. 1917), Vol. II, pp. 550-554.

sāpatna-bhrātā."[44] Though there is some uncertainty regarding him, still it may be said that in all probability he belonged to the period between 1375 and 1460[45] A.D.

12. Misarumiśra

Misarumiśra has been credited with the authorship of the work styled 'Vivāda Candra' dealing with the substantive as well as the adjective aspects of law. He wrote under the patronage of princess Lachmi Devi[46] in the middle of the 15th century A.D. The work was treated as authoritative in Mithila by the British Indian courts.[47] According to this work strīdhana was to be understood in the technical and restricted sense instead of its universal application to include any property held by a woman—"strīdhanaṃ paribhāṣikameva na sarvaṃ."[48] In this interpretation, Misarumiśra clearly differs from the author of the Mitākṣarā.

13. Vācaspatimiśra

Vācaspatimiśra wrote two treatises on law, namely, Vivādacintāmaṇi and Vyavahāracintāmaṇi, among other works. Of these two, the former deals with the substantive law and the latter deals with the adjective law. The Vivādacintāmaṇi has been regarded as a treatise of high authority[49] in Mithila, next if not equal to the Ratnākara of Caṇḍeśvara. The division into substantive and adjective law became most pronounced with the commentators. The division was already marked in Nārada and Brihaspati though it was less perceptible in Manu and Yājñavalkya and not traceable at all in the Dharmasūtras. The Vivādacintāmaṇi of Vācaspatimiśra and the Vivādacandra of Misarumiśra were greatly influenced by the Ratnākara of Caṇḍeśvara. The Vivādacintāmaṇi was written in the 15th century A. D.

14. Dalapati

Dalapati, son of Vallabha, of the Bhāradvaja gotra and of the Yājñavalkya Śākhā wrote the encyclopædic work named Nrisinhaprasāda in the 16th century A. D. The work consisted of 12 sections styled Sāra and one of the sections dealt with Vyavahāra. The author was the Chief Minister and the keeper of the records of Nijamsaha who was regarded

44. See also Vīramitrodaya, pp. 682-683.
45. Kane, History of Dharmaśāstra, Vol. I., pp. 395-96.
46. Introductory verse 2 in Mitra's Notices, Vol. IX, p. 12 No. 2901.
47. 2. Moore's Indian Appeals, 132, 147, 152.
48. Folio 33 of the Deccan College MS.
49. II Moore's Indian Appeals, 139, 147, 152; I. L. R. 20 All. 267, 290. (P. C.); I.L.R. Local, 392, 399.

as the overlord of all the Yavanas.[50] This work of Dalapati is one of the many instances to show that commentaries and Nibandhas continued to be written even under the patronage of the Muslim rulers during their reigns.

15. Pratāprudradeva

Pratāprudradeva, a king of the Gajapati dynasty ruling at Kaṭaka-nagarī (Cuttack) in Orissa is the author of the famous and extensive digest, named, Sarasvatīvilāsa which was compiled in the 16th century A. D. by an assembly of Paṇḍits called together at the capital. "The Śarasvatīvilāsa being a work composed under the express order of a king for the benefit of his subjects makes the nearest approach to the Austinian conception of law as a command addressed by the political superior to the political inferior and enforced by a sanction."[51] The work is of high authority in Hindu Law in South India subject to the general authority of the Mitākṣarā. The substantive law as well as the procedural law have been dealt with in the Vyavahārakāṇḍa. The author always refers to the ancient authorities, criticises their views and tries to reconcile them. He supplies valuable informations about the views of Asahāya, Bhavadeva, Śrīkara and others whose works have not yet come to light. He generally follows Vijñāneśvara on partition and inheritance and sometimes criticises the latter's views drawing attention to the conflicting views of Bhāruci and Vijñāneśvara. He furnishes certain important informations regarding the application of ordeals. According to the Sarasvatīvilāsa,"[52] "though the Smriticandrikā passed over the ordeals of water and poison on the ground that they had gone out of vogue, in Utkala the ordeal of water alone was resorted to and in Śaurasena (Mathura) and Magadha (Bihar), the ordeal of poison alone was administered."

16. Raghunandana

Raghunandana, who was most appropriately characterised as Smārtācāryya on account of his mastery over and erudition in the Smriti Śāstras, composed several works the most important of which was the Smrititattva consisting of 28 tattvas, two of which dealing with law were known as the Vyavahāratattva and Dāyatattva. As the names of the tattvas imply, the Vyavahāratattva dealt with the law of procedure in its different aspects and the Dāyatattva dealt with partition, inheritance, strīdhana etc. Raghunandana also wrote a commentary

50. The personal informations can be obtained from the elaborate colophons at the end of each of the sections. See also Nṛisinha Prasāda, supra.

51. Kane, History of Dharmaśāstra, Vol. I, P. 412.

52. P. 200.

commentary on Jīmūtavāhana's Dāyabhāga and that commentary also was regarded as of high authority in Bengal by the High Court of Calcutta. He flourished in the 16th century.

17. Nandapaṇḍita

Nandapaṇḍita is one of the most celebrated and voluminous writers. He wrote several books and the most important of them from the stand point of law is his Dattakamīmāṃsā, an authoritative book on adoption dealing with all conceivable aspects of the institution. No other author or book has been the subject-matter of so much discussion by the judges of the British Indian courts. Sir William Macnaughten's claim that the Dattakamīmāṃsā should be treated as the infallible guide in the province of Mithila and Benaras could not be accepted by the Privy Council without some reservation.[53] Again the Privy Council says in Bhagwan Singh V Bhagwan Singh that "to call it infallible is too strong an expression and the estimates of Sutherland and West and Bühler seem nearer the true mark; but it is clear that both the works must be accepted as being high authority for so long a time that they have become embedded in the general law."[54] The precise limits, however, to which Nandapaṇḍita should be followed by the courts are laid down in Ramchandra V Gopal.[55] Nandapaṇḍita also wrote a commentary on the Mitākṣarā. Though he generally follows Vijñāneśvara, still he is not a blind or slavish imitator and he frequently criticises and differs from his views. He does not agree with the explanation of Yājñavalkya (II, 17), and he emphatically asserts that the interpretation of the Mitākṣarā on Viṣṇu (27, 2) is wrong.[56] He prefers the father to the mother as an heir and places the paternal grandmother as an heir after the mother but before the brother. Nandapaṇḍita understands the word brother and son as including sisters and daughters as well. It is on this basis that he advocates the theory of adoption of daughters[57] like that of sons. One thing should be clearly borne in mind in this connection that daughters could be adopted as substitutes of daughters and not of sons. But the reason why the practice disappeared is not far to seek. An adopted daughter could not offer any religious oblations herself; she could benefit the adoptive father only indirectly and remotely by giving birth to a son after her marriage. Therefore, the

53. 12 Moore's Indian Appeals, 437.
54. L. R. 26 I. A. 161.
55. I. L. R. 32 Bomb. 224.
56. Vaijayantī on Viṣṇu, XXVII, 2.
57. Vide ante, Chapter VIII, 2.

religious efficacy expected from an adopted daughter had necessarily to depend on many contingencies which could well-nigh be avoided by the adoption of a son who could offer oblation direct in his own capacity. In this connection it is interesting to refer to the etymological discussion of the word duhitā indulged in by Yāska who derives the word thus: duhitā (daughter) that is, dūrahitā or dūrehitā meaning one benefitting only remotely. By this derivative analysis, Yāska shows that the daughter can benefit her father only through her son.[58] It is clearly for the reason of this practical utility that the adoption of sons only survived to the exclusion of the adoption of daughters. It may be mentioned here that the sages did not clearly mention whether daughters also could be adopted. Adoption of daughters was the result of Nandapaṇḍita's explanation of the terms putra etc. in their inclusive sense. The authoritative provision for adopting daughters is not, however, absolutely without its significance. Sometimes many desirable marriage proposals are found in actual practice to fall through on account of the identity of gotra and such other questions. These technical difficulties can be technically got over by this helpful method of adopting the daughter in question. Thus a nominal or fictitious adoption might suffice to dispense with the technical prohibition on the ground of the identity of gotra and so on.

Nandapaṇḍita also holds some other views which are rather peculiar. He recognises an uterine brother as an heir.[59] A man's predeceased son's widow also was preferred to his own daughter.[60] A widow was not allowed by him to adopt at all[61]. He also enjoined that a brother's son must be preferred for adoption to any other sapiṇḍa or sagotra.[62] The expression "putracchāyāvaham" was explained by him as meaning similarity to son born and by similarity again he implied the possibility of being begotten by means of Niyoga and the like.[63] He also evolved the curious rule that a widow could not adopt to her deceased husband her own brother's son.[64]

58. Dattakamīmāṃsā, VII, 17 (translated by Sutherland)

59. Vaijayantī on Viṣṇu, XXII 5.

60. *Ibid*, XVII, 4 ; I. L. R 16 Cal. 376.

61. This view was not accepted in any other place except Mithila.

62. This view was also treated as mere recommendatory and never mandatory. The violation of this rule, therefore, could not give rise to any legal consequence whatsoever.

63. I. L. R II, Mad. 49 (F. B) ; I L. R. 27 All. 417 ; I. L. R. 43 Mad. 830 ; I. L R. 32 Bombay, 619 ; I. L. R. 36 Bom. 33 ; I. L. R. 39 Bom. 410

The Bombay High Court has laid down that the rule is restricted to the three specified cases of the daughter's son, the sister's son and the mother's sister's son.

64. But the Privy Council refused to follow the dictum on the ground that the gloss by Nandapaṇḍita was an extension not based on any authority of any Smriti (Vide I. L. R. 37 All. 359 P. C.)

Most of these theories have been turned down by the British Indian courts, Nandapaṇḍita flourished in the 17th century.

18. Nīlakaṇṭhabhaṭṭa

Nīlakaṇṭhabhaṭṭa was the celebrated author of the Bhagavantabhāskara which was so christened in honour of his patron Bhagavanta Deva, a Bundella Chieftain, ruling at Bhareha, near the confluence of the Jumna and the Chambal. The work consisted of 12 sections known as Mayūkhas, the Vyavahāra being the most famous work dealing with law in its different aspects—both substantive and adjective. This work was of paramount authority in Gujrat, the island of Bombay and the Northern Kankan.[65] In the Marāṭhā country and the Ratnagiri districts[66] also the authority of the Mayūkha was recognised subject to that of the Mitākṣarā on the general principle that the two works are to be harmonised with each other wherever and so far as that is reasonably possible.[67] There is another work which is attributed to Nīlakaṇṭha. It is the Vyavahāratattva which is virtually based on and a summary of the Vyavahāra Mayūkha. He flourished in the 17th century. Belonging to the selfsame family[68] and flourishing about the same time, there was another author of considerable eminence. He was Kamalākara Bhaṭṭa who was credited with the authorship of more than a score of works, the most important of which from the standpoint of law, was the Vyavahāratāṇḍava dealing with the different aspects of law.

19. Mitramiśra

Mitramiśra is the famous author of the celebrated and extensive digest Vīramitrodaya which in its different sections called Prakāśa deals with the different aspects of the Smriti literature including Vyavahāra. He flourished in the 17th century and his work was treated as a high authority not only in Benaras,[69] but also, in certain cases, in Bengal[70] where the Dayābhāga is silent. The Vīramitrodaya cannot over-rule the clear provision of the Mitakṣarā and is inferior to the Vyavahāra Mayūkha in Western India.[71] The observation of the Privy Council[72] is very instructive in this connection :

65. I. L. R. 24 Bom. 373 (F. B.) ; I. L. R. 14 Bom. 23-24.
66. 12 Bom. H. C. R. 67-68 ; I. L. R, 14 Bom. 616.
67. I. L. R. 30 Bom. 442 (P. C.)
68. Kamalākarbhaṭṭa was the second son of the elder brother of Nīlakaṇṭha's father.
69. 12 Moore's Indian Appeals, 436-438.
70. I. L. R. 5 Cal. 789 (P. C).
71. I. L. R. 3 Bom. 369.
72. I. L. R. 44 Mad. 764 (P. C.)

The Vyavahāra Prakāśa is perhaps the most extensive digest on law and is divided into four parts. The first part deals with some elementary principles and general rules of procedure, such as, the meaning of the term Vyavahāra, constitution of the courts and the different stages of litigation. The second part deals with burden of proof, the different means of proof, ordeals and possession. The third part deals with the differnt titles of law constituting its substantive portion and the last part deals with matters in cases of which legal actions were to be instituted by the king *suo motu* without any action on the part of any private individual.

20. Jagannātha Tarkapancānana

He compiled the most famous and the best known digest, namely, the Vivādabhangārnava which was preceded by two other works of similar nature but of inferior quality. One of those works was published in 1774 as Halhed's Gentoo Code and the other was compiled by Trivedi Sarvoru-Śarman in 1789 A. D. Sir William Jones and Colebrooke also were largely responsible for the inspiration which was at the root of these compilations; Colebrooke translated the portion on contract and inheritance and the translation was published in 1797. The application and the influence of the work of Jagannātha Tarkapancānana were almost exclusively restricted to Bengal. Dr. Jolly[73] rightly remarks that the digest of Jagannātha which was composed at the desire of Sir William Jones in the second half of the last century, terminates the seires of authoritative digests recognised by the courts. He further says that down to the time of Jagannātha any learned Paṇḍit might propose a new Vyavasthā or adjustment of contradictory passages in different codes of law and set forth his opinion in a new composition which in course of time might become a work of authority.

21. The remaining commentators and the Nibandhakāras

Besides the commentators and Nibandhakāras, noticed above, there is a host of other authors on this branch of Sanskrit legal literature who may be conveniently divided into two categories One of these categories includes authors who made very little contribution to the legal topics; their works, though otherwise very conspicuous for their discussions on several Dharmaśāstra topics, hardly contain any discussion on strict topics of Vyavahāra or positive law. In the first category are thus to be included Bhatriyajña,[74] Śrīdhara,[75] Aniruddha,

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73. Outlines of an History of Hindu Law (Tagore Law Lectures, 1883), P. 30.

74. Bhatriyajña was one of the very earliest commentator flourishing about the time of Asahāya. He explains the term saṃvibhāga by saying "saṃvibhāgo bhātridāya iti. See Grihastaratnākara, Folio 78a of D.C. MS No. 44 of 1883-84.

75. He refers to the acts that have to be discarded in the Kali age ' Kali-varjjya",

Ballālasena, Rudradeva, Nāgojibhaṭṭa, Kāsīnātha, Harihara,[76] Kullukabhaṭṭa, Nārāyaṇabhaṭṭa, Kamalākarabhaṭṭa and the authors of the Prakāśa, Pārijāta, Pradīpa and Madanaratna. In the other category are to be included the authors who have dealt with at least some of the topics of Vyavahāra. For obvious reasons, the list of commentators and Nibandha-kāras cannot be exhaustive. Again there were many such works which were followed in a very limited area by only a few number of people and as such they could not attain the same distinction as the works that are usually well-known in the history of Hindu legal literature.

In passing, reference may be made to those commentaries and Nibandhas, which dealt with legal topics to some extent in one way or another. The Kāmadhenu[77] was an early commentary occupying a very celebrated position. This work was frequently referred to by other subsequent commentators, such as, Lakṣmīdhara, Śūlapāṇi, Caṇḍeśvara, Śrīdhara and Hemādri. While commenting on the text of Kātyāyana "Dāsasya hi dhanaṃ yat syāt svāmī tasya prabhurmataḥ" the author of the Kalpataru says, "Yadā prasāde svāminā dāsasya krite dattaṃ tatra dāsadhanepi svāmī prabhuriti Prakāśa-Halāyudha-Kāmadhenu-Pārijātaprabhritayaḥ."[78] There is uncertainty about the authorship[79] of Kāmadhenu, but whoever the author, the work must have been composed between 1100 and 1200 A. D. as it has been cited as an authority by the Kalpataru and the Hāralatā, though it has not been mentioned by Medhātithi or Vijñāneśvara.

Halāyudha was an eminent commentator,[80] as he was frequently cited by many subsequent authors like Caṇḍeśvara, Harinātha, Lakṣmīdhara and others. He was in favour of the institution of Niyoga and contended that a widow not submitting to Niyoga will be deprived of her deceased

76. According to S'ankha-Likhita—Kanyāyamasakāmāyam dvyangulacchedadaṇḍaḥ. Harihara, however, offers a different explanation for the word "dvyangulaccheda." See Vivādaratnākara, p. 402.

77. One of the striking views held by the author of this commentary was that Niyoga should be practised by the widow of a sonless man and also that the son born as the result of appointment should be held entitled to inherit the wealth left by the deceased husband.

78. Folio 876 of the Kalpataru.

79. According to Caṇḍes'vara, the author of Kāmadhenu was Gopāla—Gopalasya tu Kamadhenuramaṇam Kāmyārthadugdham svayam saṃdugdhe...is found in the Vyavahāratnākara. Aufrecht however, attributed the authorship to S'ambhu and according to Mr. K. P. Jayasval, Bhoja was the author of this work. But none of these theories can be accepted as enitrely correct.

80. He must have flourished after the 11th century A.D. Medhātithi and Vijñānes'vara did not mention him. But the Kalpataru took him as an authoritative commentator.

husband's property. Again according to Halāyudha, parents were preferred to brothers in case of inheritance of ancestral property, but when the property was self-acquired without detriment to the family and ancestral property, the brothers could succeed before the parents. He was further of the opinion that if any member concealed any item of property at the time of the partition, he was not to be guilty of theft.[81] "Atrāvibhaktatvādeva vibhāge prāpte vacanārāmbhotra cauryadoṣābhāvaṃ jñāpayediti Halāyudhaḥ."

Bhāvadevabhaṭṭa wrote among other works one book on judicial procedure, named Vyavahāratilaka, as it is conclusively shown by references in the Vyavahāratatta and the Vīramitrodaya. Raghunandana remarks, "Astavyastapadavyāpi ananvitārthapadavyāptamiti Vyavahāratilake Bhavadevabhaṭṭaḥ."[82] He also further refers to the discussion of Halāyudha with apt illustrations regarding what might be regarded as a weak reply or a written statement.

The most striking is the view of Bhavadevabhaṭṭa[83] on adverse possession, which when continued for twenty years, raises the presumption that the real owner has abandoned it.[84]

The Kalpataru was an important work and it was ascribed to Lakṣmīdhara.[85] The complete MS of this work has not yet been discovered. The legal topics have been discussed in the twelveth Kāṇḍa and they were of the usual description the king's duty to look into the litigation of the people, the judge, the constitution of the sabhā, meaning of Vyavahāra, the plaint, the reply, the means of proof, enumeration of the title of law, the various kinds of punishments, units of measures etc. riṇadāna, surety, sale without ownership, partnership and the other titles of law.

Haradatta was held in high esteem as an ideal commentator. He composed many commentaries two among which were on the Dharmasūtras of Gautama[86] and Āpastamba.[87] He refers to a very nice distinction

81. Vivādacintāmaṇi, p. 143; Cf. Dāyadatta, p. 182.

82. Vīramitrodaya, p. 85.

83. *Ibid*, p. 208.

84. *Ibid*, pp. 212-214.

85. Details about the personal history of this writer are found in an inscription which was discovered in the temple of Ananta Vāsudeva, at Bhubanes'vara (E. I. Vol. VI, p. 203) edited by Kielhorn.

86. The commentary on Gautama was known as Anāvila.

87. The name of the commentary on Āpastamba was Anākula.

between the Brāhma and other forms and the Prājāpatya form of Hindu marriage. According to the stipulation in the latter, the husband is not to enter into any other Āśram or to marry any other woman—"Nāśramāntāram pravesṭavyaṃ nāpi strayantaramupayantavyamiti mantrena samayaḥ kriyate. Eṣa Brāhmādeḥ Prājāpatyasya viśeṣaḥ."[88] Haradatta was not against the widow's rights of inheritance. He refers to the relevant texts of Āpastamba and Gautama and agrees to accept the view of the latter who recognised this right in the most unambiguous language.[89] Haradatta must have flourished in the 13th century.

Hemādri was a voluminous writer belonging to the Deccan. His work Caturvargacintāmani was a sort of encyclopaedia discussing all rites and observances enshrined in the different scriptural literature of the ancient Hindus. Though his work is mainly of non-legal character, still he occasionally refers to some legal topics. On one occasion he quotes the relevant text of Gautama and discusses the sources of ownership: "Svāmisambandhenaiva nimittena yadanyadīyaṃ dravya-manyasya saṃbhavati (svaṃ bhavati) sa dāyaḥ." His work on dāna and vrata became so popular and authoritative that the king Bhāskara was described as having made various gifts following the writing of Hemādri.[90] Harinātha is the author of Smritisāra. The name Smritisāra or Smritisāra saṃgraha has been used by other writers also. Harinātha has referred to many foregoing commentators and Nibandhakāras, such as, Vijñāneśvara, Harihara and others. He, in his turn, has been frequently quoted as an authority by many authors also. Of the two MSS that were available in the India Office one deals with some Dharmaśāstra topics other than law or Vyavahāra. But the other MS deals with the usual and principal topics as concerning division and partition of property, father's share at the time of partition, special share for the first born son, the classes of persons excluded from inheritance and partition, impartible estates, definition of strīdhana, the different kinds of the secondary sons, inheritance of property when the deceased leaves no son behind, re-union after partition, gambling and betting, the different forms of punishment and the different stages and terms for the law of procedure including the plaint, the written statement, evidence—oral and documentary, possession,

88. On Gautama, IV, 5.

89. Āpastamba Dharmasūtra, II, 6, 14, 2.

90. An inscription of the king Bhāskara alias Bhavadeva, dated 1369 A. D. fully corroborates this. Similarly the Vanapalli plate of Anna Vema, dated 1380 A. D. also describes Vema as making several gifts as in Hemadri and his son as one who observed the vratas and dānas—"Hemādridānavratī." Pedda-Komaṭi-Vema is also described as eager for making gifts according to the rules of Hemādri— "Hemādri Kalpodita dānadakṣa" E. I. Vol. XI, p. 325.

oaths, ordeals and judgments. Regarding re-union he makes a very significant observation.[91] From the different references to and by Harinātha, it seems that he flourished in the first half of the 14th century[92] about the time of Caṇḍeśvara.

Nrisimha Prasāda, a work of encyclopaedic character dealing with various topics of the Dharmaśāstra was written by Dalapati or Dalādhīśa. It is rightly open to suspicion if this was the real name of the author who belonged to the Deccan. From his work also, it is clear that he supported some peculiar customs of Southern India. According to him the marriage with the daughter of mātula[93] was sanctioned by the Vedas and as such it did not deserve to be censured — "Vastutastu mātulasutāpariṇayanam vedabhihitatayā na doṣa iti vistarena vakṣyāmaḥ.

Raja Toḍaramalla compiled a famous encyclopaedia of different subjects, such as, ācāra, dāna, śrāddha etc. including Vyavahāra. Each of these subjects was treated in a separate section which was known as a "Saukhya." The "Vyavahāra saukhya" dealt with law including its various topics, such as, the responsibility and duty of the king in matters of administration of justice, the constitution of the sabhā, the qualification and appointment of judges, the significance of the term Vyavahāra, the description of the different Vyavahāra pādas or the titles of law, time and place of law suits, the plaint, the written statement, the pratinidhi or the representative of the parties, the relative superiority of one kind of proof or another, different kinds of witnesses, documentary evidence, the importance of possession, sources of ownership, influences, circumstancial evidence, ordeals and oaths and different kinds of punishment including fines. The Vyavahārasaukhya begins with an invocation of the Lord Shiva followed[94] by an eulogy[95] for the Mughal emperor Akbar.

Anantadeva was responsible for the compilation of a very extensive digest which was known as the Smritikaustubha.[96] This work was

91. Folio 37 of D.C. MS No. 57 of 1883-84.

92. No reliable information about the personal history of Harinātha is available.

93. Saṃskarasāra, Folio 9. The work is divided into twelve sections called sāra. The Vyavaharasāra dealt with the usual topics of law such as the meaning of Vyavahāra, the titles of law, the means of proof and the principles of inheritance.

94. Toḍaramalla was the famous Finance Minister of Akbar.

95. D. C. MS No. 366 of 1875-76, verse No. 2.

96. This Digest consists of several sections known as Kaustubhas dealing with different subject-matters, such as, saṃskāra, ācāra, dāna etc. Each Kaustubha was further subdivided into "didhitis." There was elaborate discussion on adoption and this part was referred to as Dattakadidhiti.

recognised as authoritative by the Privy Council also.[97] He elaborately discusses the different aspects of the question of adoption as to who can adopt, who can be adopted, the different ceremonies and formalities of adoption, the rules of succession by the adopted son and so on. Like the author of the Dattaka Mīmāṃsā, he favours the adoption of nephew as highly laudable in the first instance, "then one may select any sagotra, sapiṇḍa, then an a-sagotra sapiṇḍa, then a sagotra but a-sapiṇḍa, then any one of the same caste, though not sagotra, but a daughter's or a sister's son cannot be adopted nor can a brother, a paternal or maternal uncle be adopted." A Śūdra can legally adopt a sister's son or a daughter's son. An only son or the eldest son cannot be legally adopted. A wife can adopt with consent of her husband while he is alive. But a widow does not require any previous permissiom from her husband. The boy to be adopted may be below or above five and he may be taken in adoption either before or after the performance of the Cūḍā ceremony in the natural family. He refers to the Kālika Purāṇa.[98]

Like the author of the Dattakamīmāṃsa, Anantadeva also is in favour of adoption of daughters.[99] Nīlakaṇṭha, however, is against this view.[100]

97. 12 M. I. A. 397, 438 ; I. L. R. 3 Bom. 353 361.

98. Saṃskāra Kaustubha, pp. 169-70; see also Vyavahāramayūkha, p 114, in connection with the observations on the Kalikapurāṇa.

99. Nandapaṇḍitā, the author of the Dattakamīmāṃsa, advocated the theory of adoption of daughters mainly on the grammatical construction of the word putra, santāna or apatya etc. each of which words includes daughters also. It should, however, be noticed that no author of the Dharmasūtras or Dharmaśāstras said anything about the adoption of daughters.

100. Saṃskāra Kaustubha, p. 138 ; Cf. Vyavahāramayūkha, p. 109.

CHAPTER X

Administration of Hindu law during the Muslim period

1. Introduction

The period of the commentaries and the Nibandhas, as it has been seen, covers the longest period from 900 A.D. This period also includes the period of Mahomedan rule in India. The most of the important commentaries and Nibandhas were composed during the Mahomedan period. This is a sure indication that Hindu law did not die out during the Mahomedan rule in India. It could not die out. Dr. Jolly also refers to the Nrisiṃhaprasāda,[1] written by Dalapati, in the 16th century and the Toḍarānandasaukhyas[2] written by Toḍaramalla, the famous Finance Minister of Akbar, in the same century. During the Mahomedan period the natural and untrammelled growth of Hindu law was simply arrested to some extent. The rulers were strangers to this country. They did not accept Hindu law for themselves; nor did they abolish the Hindu system of law altogether. Hindu law was allowed to be reserved for the Hindus and the Mahomedan rulers did not interfere with this system in any very appreciable way, so far as its civil aspect was concerned. The result was that in this way the Mahomedans followed their Mahomedan law and the Hindus were allowed to stick to their own system of law. Thus arose the two separate systems of personal law which practically proceeded on parallel lines and which remained to be modified later only at the time of British administration. It was very wisely and expediently decided not to interfere with the personal laws of the Hindus. It was clearly understood that a successful subjugation of the conquered must depend on the respects shown to their sentiments in general and to their laws and manners in particular.[3] This was with respect to civil law only. The case was different in relation to criminal law. Herein the law was administered mostly by the selfsame tribunals which made no distinction between the Hindus and the Mahomedans or their systems of law. As a matter of fact

1. Outlines of an History of the Hindu Law (Tagore Law Lectures) by Dr. Jolly, p. 18.
2. *Ibid*, pp. 19-20.
3. The Abbasides also who ruled in Bagdad during the five centuries after the Omeyades ruling at Damascus reserved the laws of the Non-Muslims for governing the relations and transactions amongst themselves. The Mahomedan rulers (The Sultans of Delhi) also followed the Abbaside policy on this point. The Sultans in their turn were again followed by the Moghal Emperors.

the rulers underlined criminal administration and inflicted just and deterrent sentences most impartially, irrespective of any consideration of the status or personality of the accused persons. Again the fundamental conceptions of crimes and their punishments were essentially similar to a very large extent in the Hindu law and the Mohamedan law except, of course, the Muslim canon law which was specifically inapplicable to the Non-Muslims. It appears from the Fatwa-e-Alamgiri[4] that the application, if at all, of the principles of Muslim law to the Non-Muslims would be governed by proclamations and the edicts of the rulers[5] from time to time. When there was no mention of anything regarding the Non-Muslims, the principles directly concerning the spirit of Islam could not be applied to the Non-Muslims. Thus as eating or selling pig's meat was allowed by the Hindu religion, no Hindu could be prosecuted according to the Muslim canonical law for such an act of a Hindu. The Muslims or the followers of Islam alone could be tried and punished for such acts.[6] It was one of the most generally accepted principles of the Muslim rulers that the law of Shara' having been derived from the "Usul-ul-Usul" must be reserved exclusively for the Muslims alone and all the non-believers or the Non-Muslims were to be kept outside its orbit.[7] It was clearly for the preservation and prosperity of the society that the administration of the criminal law was strictly regarded as a special responsibility of the state.

The distinctions between the personal laws of the Hindus and the Muslims which began in India with the Mahomedan rule were also maintained by the Britishers ; but the tendency was to reduce the scope of the distinction to its minimum. During the Mahomedan rule, practically speaking, only the criminal law was largely common to the Hindus and the Muslims with the exception of the application of oaths[8] and ordeals.[9]

4. Vol. II, pp. 347-357 (Cal. Ed.)

5. Mirat, I, p. 250.

6. Fatwa-e-Alamgiri, Vol. II, p. 357.

7. *Ibid*, (Baillie), p. 174.

8. Oaths were administered to the witnesses, as it appears from the Ain-e-Akbari, Vol. II. pp. 37, 41. The Muslims had to swear in the name of God and the Hindus had to swear by the cow. (Fatwa-e-Alamgiri, Baillie, p. 748).

Ovington, an English traveller, who attended many trials in several courts of Muslim India, says that oaths were administered in controversies and decisions of rights. A Voyage to Surat (1689), p. 138. If a plaintiff would refuse to take oath, his case would be dismissed. (Baquiat us Salehat, p. 21).

9. Muslim law did not recognise ordeals and the Muslim rulers did not apply them because they implied a Hindu institution connected more or less with Hindu religion.

And the civil law was administered according to the personal systems. The British rulers, however, began to widen the scope of the common or the general law, at the cost of the range of the respective personal laws. As a matter of fact, many Acts were passed to make the law as far as possible uniform for the Hindus and the Muslims. The Indian Penal Code, the Indian Contract Act, the Civil Procedure Code, the Criminal Procedure Code, the Transfer of Property Act, the Indian Evidence Act, and the Indian Succession Act are some of the most important legislative enactments to show that the difference between the two personal systems of law, as they originally existed, was being obliterated. The tendency towards uniformity was to be noticed not only in cases of Acts but also in cases of introduction and application of the principles English law as far as the question of torts, equity and other branches of law were concerned. For torts there was never any general Act or Statute in India ; but the principles that were borrowed from English law were applicable to both the Hindus and the Muslims alike. The most significant juristic expression "justice, equity and good conscience" also was equally applicable to the Hindu and the Muslim systems of law. The meaning of the above expression will be discussed fully in a subsequent chapter.

2. Hindu law and Muslim law : compared and contrasted

Thus though there were two parallel systems of personal law in India during the Mahomedan period, still there was the minimum influence exerted by one upon the other. Of course, here and there, somewhat similar concepts and institutions might be come across, but any positive evidence of definite influence of one upon the other will be rather debatable. The reasons perhaps were that though in details the two personal systems of law were widely different, nevertheless, regarding their doctrinal basis, they were

They were never encouraged by the Sultans or the emperors of Delhi, though they did not object to their being applied to Non-Muslim states under their protection, when both the parties were, of course, Hindus. Hamilton who visited India during the reign of Aurangzeb (1658-1707), has recorded one trial by ordeal in South India where the accused person was asked to prove his innocence by putting his hand into a pan of boiling oil (Vol. I, p. 315). Sultan Jalaluddin Khilji wanted to apply ordeals in the trial of Sidi Maula who was prosecuted for sedition and whom the court was disinclined to convict on the strength of the evidence of a solitary witness. The Sultan wanted to test the innocence of the accused by asking him to walk through the fire. But the Sader Jahan and other judges vehemently opposed this proposal. They argued quite logically that fire did not distinguish between the innocent and the guilty. (Barni, p. 211 ; Badaoni, I, p. 171).

Akbar also made an attempt to apply ordeals in 1560, but due to the opposition of the judges and the jurists, the proposal could not be accepted. There is, however, no sufficient warrant for the belief that Akbar wanted to do so for pleasing the Hindu Rajputs (Smith, Akbar, p. 345).

essentially identical. Thus both the systems had a religious conception of law in the sense that they were ultimately supposed to have been based on revelation and that the law bound the kings, the judges and the subjects alike. The rule of law governed both the systems of law. The rulers[10] were supposed to have been entrusted with the administration of justice among the subjects. As a matter of fact, both in Hindu law and Mahomedan law, the rulers[11] themselves administered justice as far as possible and the rest was got done by the exceptionally honest and learned judges[12] appointed by them after serious deliberation and mature consideration. According to the very message of the prophet Muhammad, God, the Omnipotent Being alone, had the attributes of sovereignty. The Prophet himself did not claim for him any better position than an ordinary man. Similarly a Muslim ruler was regarded as a God's servant responsible for the observance of His law by all alike. He was thus not the people's master but only held an office in trust[13] for the Supreme Being. In 1661, Aurangzeb refused to allow possession of crown jewels to Shahjahan arguing that he was holding them as God's chosen custodian and that he was a trustee of God's money for the benefit of his people. Sher Shah considered justice as one of the most excellent of religious rites.[14] Jahangir also regarded the daily administration of justice in

10. As it has already been observed, (see ante, Chapter I), the status of a Hindu king implied a bundle more of duties than of rights. If there was any maladministration of justice, it was the king who was mainly to blame; in case any actual offender was not duly punished, the offender would be released from the sin getting it transplanted on the king. In a word, duties duly performed would make him praiseworthy and duties neglected and violated would lead him to calumny and hell. Similar were the provisions of the Mahomedan law. (Alamgirnamah. p. 391; Mirat, Vol. I, p. 251; Barni, p 373).

11. According to Hindu law, the king was entrusted with original as well as appellate jurisdiction. In both the cases, his was the highest tribunal in the kingdom. According to Berneir also the kings of Hindusthan seldom failed even when in the battlefield to hold trials in the same way as when in the capital. This habit was based on law and duty and its observance was rarely neglected. (Bernier's Travels, pp. 263, 360, Cf. Cambridge History of India, Vol. IV, p. 182).

12. Both in Hindu law and Mahomedan law many qualifications were insisted on while appointing judges and Qazis. According to the Muslim jurists, the selection and appointment of suitable and competent men as Qazis were regarded as highly responsible jobs. (J.R A.S., 1910. p. 767; Barni, pp. 351-52). Barni relates the story of the appointment of an incompetent man Ziauddin, as the Chief Justice, by Qutubuddin which incited the people to revolt and which ultimately resulted in the death of both the Qazi and the king. (Bib. Indica. pp. 406-8). Akbar (Ain-e-Akbari; p. 283) and Aurangzeb (Dow, II, p. 396) were particularly careful about the selection and appointment of judges.

13. Anecdotes of Aurangzeb, J. N. Sarkar, p. 110; Mirat, I, p. 258.

14. Elliot, IV, p. 411.

public as one of his most sacred duties.[15] Shahjahan once said that the administration of justice was the main stay of his government. According to Aurangzeb also "the garden of administration was to be watered by the rains of justice". The Muslim criminal law did not make any distinction between the rulers and the subjects. The law of the Shara' applied equally to all without any discrimination or partiality in behalf of the officers of the king. In this sense, the Sultans and the Mughal emperors followed Omar, the second Caliph of Islam.[16] The Muslim rulers in India seldom[17] tampered with the administration of justice and often they submitted[18] to the law courts even against their will.[19] The monarchs could sue and be sued.[20] Dr. Versy Fitzerald also refers to certain cases where the Caliphs, Omar and Rashid of Bagdad, submitted to the decisions of courts in Arabia. Constitutionally, however, the rulers could and they often did exercise[21] the right of prerogative in commuting and pardoning sentences almost of all kinds. This prerogative, however, was not exercised by the first four Caliphs ; it was introduced for the first time by Caliph Al Mouvyah in the 8th century.[22] The Mughal emperors also insisted on their confirming the death sentences, wherein actually they could find an opportunity to commute the capital sentences in suitable cases.[23] Apart from these prerogatives, the rulers also had a right and also a duty to supervise the entire judicial administration of the country. The adjudication by the rulers themselves was often sought by the people for their quick and impartial decisions. From the above it will be abundantly clear that both the systems of Hindu and Muslim laws were largely governed by the rule of law. Thus the doctrinal similarities between the two systems played a

15. Cambridge History of India, Vol. IV, p. 182. (Storia du Mogor, Manucci, IV, pp 118-119).

16. Ameer Ali, Spirit of Islam, p. 279; J.R.A.S. (1911) p. 664.

17. Alauddin's conversation with Qazi Mughis, (Barni, pp. 289-94) ; Muhammad Tughlak's address to his judge, (Badaoni, I, p. 239) ; Barni, pp. 510-15.

18. The case of Sidi Mowla, (Badaoni, I, pp. 170-172). The case of the widow against Gyas, (Stewart, pp. 90-91). None ventured to put forth a hand upon the Qazi. (Storia du Mogor, II. p. 254).

19. Stewart, pp. 90-91.

20. Badoni, I, p. 239.

21. Many cases of commutations and prerogatives were to be found in the reign of Jahangir. Tuzuk-i-Jahangir, by S. Ahmed, p. 62 ; Shajahan, (MS 370, India Office Library) ; Aurangzeb, (Khafi Khan, II, 64). It is said that Aurangzeb granted pardon to Jashwant Singh twice.

22. Ameer Ali, Spirit of Islam, p. 280.

23. Storia du Mogor, I, Mannacci, pp. 201-203.

very important part in avoiding major conflicts and frequent clashes in the administration of the law in the country as a whole.

The analogy between Hindu law and Mahomedan law does not end with the points of similarity regarding the fundamental doctrines. In the developments of these two systems of law as well as in the consideration of the different sources to which they owe their existence also there were essential points of resemblance. Thus the most important sources of Hindu law are the Vedas (Revelation), the Smritis (Tradition), the Nibandhas and the Commentaries (opinions and interpretations of jurists) and customs and equity (actual usages and their explanations by the courts). Exactly corresponding are the sources of Mahomedan law which may be enumerated thus: The Quran, (Revelation, which contains the words of God), the Sunna (tradition, as the precepts and usages of the prophet Muhammad), Ijma (the consensus of the jurists)[24] and lastly the Qiyas (analogical deductions based on customs and justice, equity and good conscience). The ultimate fates of both the systems of Hindu law and Mahomedan law were again more or less the same during the British administration in India. The powers in the courts of British India to apply the personal laws of the Hindus and the Muslims to them were derived from and regulated by the statutes of the British Parliament and the central and provincial legislatures of India. The personal laws of the Hindus and the Muslims were applied only in some and not all matters. Throughout British India questions regarding succession, inheritance, marriage and religious usages were decided according to the personal laws of the Hindus and the Mahomedans except in so far as such law has been amended by legislative enactments. Besides the matters, referred to above, there are certain other matters in which the personal laws of the Hindus and the Mahomedans were applied sometimes by the application of the principles of justice, equity and good conscience.[25]

24. After the initial conflicts and clashes during the first few centuries of Islam were over, the military ardour of the Muslims largely abated during the reigns of the Abbasides when there was a revival of learning. The Abbaside rulers brought to their courts at Bagdad the sage of law from Kufa and Medina. It was clearly at this time that the Muslim law became the subject of scientific and philosophical discussions and most of the important points of Muslim law were settled during the period.

25. The expression "justice, equity and good conscience" was used in a rather arbitrary sense so far as Hindu law and Mahomedan law were concerned, when it was so interpreted as to imply the application of the principles of the English law as far as they were applicable to the peculiar circumstances of India. This was not a strictly impartial and unbiased juristic approach. (See supra).

Thus though we a find some points of similarity between the two systems of law, still as it has already been said, it is difficult to estimate the exact amount of influence, if at all, of one system upon the other. According to Cowell, (Tagore Law Lectures), preemption has been borrowed by Hindu law from Mahomedan law; but in the Arthaśāstra of Kauṭilya we also find the rudiments of pre-emption regarding the sale of 'Vāstu'. According to the relative text of Kauṭilya, kinsmen, neighbours and rich persons shall in succession go for the purchase of land and buildings.[26] Again in Hindu law we have 12 or rather 14 kinds of secondary sons whereas there is no conception of secondary sons according to Mahomedan law except the conception of son by acknowledgement. It is difficult to say if the conception of acknowledgement was in any way influenced by the conception of "Apabidha" son in Hindu law which is also principally based on fosterage. Originally, there was will in Mahomedan law but not in Hindu law and again there was adoption in Hindu law but not in Mahomedan law. The purposes of will and adoption being to a great extent analogous, testaments are most closely connected with adoption. Testaments, like adoption, were generally resorted to for the continuation of the family and perpetuation of the family sacra. Adoption was found more or less in every Indo-European country; the Romans also had adoption; but not being satisfied with it, they soon conceived the idea of wills. From them wills were taken by the Europeans to the exclusion of adoption, whereas the East mainly resorted to adoption and ignored wills. The question of wills occupied a very important place in the speculation of jurists and philosophers particularly in connection with the conception of property. Thus Fustel de Coulanges holds that in ancient times people could not make any testament as the property belonged to the family as a whole. Plato and Aristotle also discouraged wills. Aristotle saw no other means of retaining the estate in the family except by abolition of testamentary power. Plato also speaks of a man who exclaimed in his death-bed that it was cruel indeed not to be allowed to dispose of property according to one's own desire. To this the legislators answered that a man being only a sojourner in this world and expecting to die any moment should not think of perpetuating the property. Similar also was the tradition of Abu Vekaas who in his death-bed enquired of the prophet if he could dispose of the whole, two-thirds or even half of his property, by means of a will. But the prophet replied in the negative. Then he wanted to dispose of one-third of his property—a proposal to which the prophet agreed. Grotius also believes that the power of wills

26. Kauṭilya's Arthaśāstra, Book III, Chapter IX.

lies in natural law. According to Kant, by will the heirs accept the fulfilment of the promise of the testator. Puffendorf again holds that will is the creation of civil law. In the words of Leibnitz, however, will indicates the immortality of the soul. According to Montriou, the Hindus also originally could not will away their property in as much as the property was regarded to have belonged to the entire family. Strange also shared the view of Montriou. But at length the Hindus have been allowed the right of testamentary disposition. As it has already been seen, a Muslim could not dispose of his entire estate by will. Obviously, this restriction was imposed with a view to ensuring the adequate maintenance of the other members of the family. A similar provision was to be seen in Yājñavalkya[27] also. The rights of the descendants could not be defeated altogether—"Vrittilopovigarhitaḥ." According to Dr. N. C. Sen Gupta, "On the whole it can be said with confidence that there is no trace in the ritual literature of the Vedic time of joint families of married sons and grandsons living in the same house—with the father. The Vedic family consisted of the husband, wife and immature sons and unmarried daughters[28]......... In later law we find restraints on alienation growing. The text of law bearing on the subject which were doubtless developed in different stages of the society and the different environments are an interesting study. They show a gradually growing tendency to restrain the father's free dealings with the property till at last we reach the climax in a theory of the acquisition of ownership with the father of sons and grandsons from the moment of their birth."[29]

Conversion of Hindus to Islam played a very important part as regards the mutual admixture and influence of the two systems of Hindu law and Mahomedan law. Thus in absence of any customs to the contrary a convert to Mahomedanism is to be governed by the provisions of Mahomedan law.[30] The Khojas and the Cutchi Mamons were originally Hindus; they embraced Islam about 400 years ago. But inspite of their conversion, they retained Hindu law of succession and inheritance; they also unlike the Mahomedans were given the rights to dispose of their entire property by will. These rights were recognised on the ground of custom. But after the passing of the Shariat Act of 1937, these customary laws

27. Yājñavalkya, II, 175.
28. Evolution of law, Appendix.
29. *Ibid*, pp. 159-160.
30. 35 C. W. N. 89 ; III I. C. (1228) 2.

have been very much curtailed.[31] Customs 'urf' in Muslim law, as in any other system, played a very important part not only in case of conversion but also in otherwise normal conditions even against the definite provision of the shara'. Thus in the greater part of the Punjab, females[32] were excluded from inheritance. Again according to the decision of the Calcutta High Court,[33] acceptance of interest was prevalent among the Muslims though it was prohibited[34] by the Quran.[34a] On the other hand, in the Shialkot district, at least in certain villages, the Hindus adopted[34b] the Muslim law of inheritance for the females.[35] The interchanges of customs and practices even against the definite provisions of the Shara' indicate that some attempts were made or at least they were connived at with a view to harmonising and reconciling[36] the acts and beliefs of both the sects. Sometimes in cases involving both Hindus and Mahomedans the former would agree to have the cases decided on the strength of oaths taken by the latter in mosques. One such case was referred to where the plaintiff was Mahiuddin, a Muslim and the defendant was Anbart, a Hindu. In this case, the defendant, though a Hindu, readily agreed to the other party's taking oath in a mosque.[37] This is, however, an instance as to how the Hindus also were unconsciously influenced by Muslim faith and practice [37a]

3. Administration of Hindu law

Though politically there was a division between the believers and the Non-believers, yet in the eye of law, all were equal. There was impartial and stern justice essentially based on Islamic law—equally binding the king, the Qazis and the Magistrates. Justice and beneficence must be

31. The Halai Memons domiciled in Bombay are governed in all respects by the Mahomedan law. But the case is different with the Halai Memons of Purbandar in Kathiawar.

32. Wilson, Punjab Customary law, p. 59, (Cf. Moptelah Practices of Hindu Rituals, Malbar Gazeeteer, p. 196.)

33. Miakhan Bibijan, 5 B. L. R. 500.

34. According to some of the Sūtra-writers also, usury was regarded as very reprehensible.

34a. III, 130 : O ye who believe, devour not usury doubled and multiplied.

34b. Muslim administration was followed to some extent and adopted by many Hindu rulers including Shivaji (J. N. Sirkar, Mughal administration, p. 4.)

35. Tupper, II, 131 ; 70-75 ; 88-89 ; 157-259.

36. Ameer Ali. Islamic Culture (1927), p. 94.

37. Baquiat us Salehat, p. 9. See also Administration of justice in Medieval India by N. B. Ahmed, p. 222.

37a. Mughal Administration by Sir J. N. Sarkar, p. 9 (foot note).

exercised alike for all subjects. The king is the shadow of God and gift of divine mercy is common to all the believers and the non-believers. He must curtail the hand of oppression upon the weak, because the prophet himself said, "The cry of a victim of injustice even if he be a Kafir is never rejected by God." The emperor also who had conquered these lands from the Heathens had given his word that he and his successors would let them live under their own laws and customs and he, therefore, allowed no breach[38] of them. In civil disputes generally between themselves, their personal law was recognised, but the disputes were usually to be referred to their own theologians (Paṇḍits)[38a] or assemblies[38b] (Panchayats) or jurors as was the procedure adopted by the Abbaside Caliphs of Bagdad.[39] The whole of the Shara' law was never indiscriminately and rigidly applied to the Hindus in India. In fact it has been said in the very Shara' itself that the whole body of Islamic Law is not applicable to the Non-Muslims. According to the Fatwa-e-Alamgiri also, Non-Muslims are not subject to the laws of Islam ; their affairs should be regulated according to the principles of their own religion. The purely Islamic Civil Code governing the laws of inheritance, marriage and other analogous matters of the Muslims did not at all apply to the Hindus. The Hindus were allowed to be governed by their own laws on these topics of civil law. The case was, however, different so far as the Islamic Penal Law was concerned. The conceptions of crimes and the purposes and sometimes the methods of punishments being virtually identical, there could not be any very appreciable difference between the two systems of law from the standpoints of wider interests of the society and the state. The masses also could not ordinarily perceive the differentiation and the transition between the Hindu and the Muslim principles of criminal administration. Thus the criminal law was applied more or less equally to both the Hindus and the Muslims alike for guaranteeing security of life and property. The Hindus in a sense generally enjoyed true self-government and the rulers did not interfere with their personal law and local affairs.

4. The Non-Muslims

The Non-Muslims were broadly classified as Jimmis and Mustamins—the former accepting the overlordship of the Muslim rulers and the latter having the analogous position of a modern alien. The Shara' did not advocate any change or modification in the enjoyment of the rights,

38. Hamilton, Hidayah, p. 14.

38a. History of India, Mill, III, p. 369 ; Cambridge Hfstory of India, III, p. 45.

38b. Kennedy, Vol. I, p. 308.

39. Ameer Ali, History of the Saracens, p. 422.

religion and customs of the Non-Muslims.[40] The prophet himself granted a charter of liberties to the Non-Muslims and recognised their personal laws and usages. His successors and followers also followed him in repeating similar assurances.[41] This general provision of law for the Non-Muslims was even more liberally construed in actually applying some broad principles of Islamic Law. Thus according to the strict provision of the Shara', a non-believer was under a disability to give evidence in court against a believer. But in practice this was not strictly followed. Thus Marique[42] (1629-1643) records a case where a large number of Muslims was prosecuted and convicted exclusively on the evidence of the Hindus concerning the killing of a peacock by the Mahomedans. The village was exclusively inhabited by the Hindus. The view of Abu Hanifah[43] was particularly more catholic in respect of the treatment meted out to the Hindus. According to him, judicial discretion could be exercised more liberally in individual cases on the grounds of public policy and justice, equity and good conscience. The Non-Muslims also were given the right of compensation in murder cases[44] and in practice they were subject to the adjective[45] criminal law as well. The Non-Muslims were given decrees even against the Caliphs of Bagdad.[46] Many taxes were abolished from the Non-Muslims by Jahangir[47] and Aurangzeb.[48] Some disputes among the Non-Muslim nobles were no doubt tried by the rulers themsèlves; nevertheless, the Non-Muslims always had the right of getting their cases tried by the law courts with the help of the Paṇḍits who were the

40. Ameer Ali, Muhammadan Law, II, p. 33.

41. Ameer Ali, Spirit of Islam, p 274 ; Orient Under the Caliphs, S. Khuda Box, p. 225.

42. Travels, II, p. 112 , Elliot, IV, pp. 26-27.

43. Wide discretionary powers were also given to the Qazis as recommended by Abu Hanifah.

44. Spirit of Islam, Ameer Ali, pp. 274-275.

45. The adjective law of the Muslims was very simple and brief. There was no elaborate rule of procedure as among the Hindus or other people. There was also no formalism nor any appeal to any superstitious belief. The Sanskrit drama Mricchakaṭikam, of course, illustrates the most summary procedure even in a murder case. In that case, after the complaint was lodged by Saṃsthānaka, immediately the accused Carudatta was summoned to the court. And perceiving the relevancy of Vasantasenā's mother's evidence, the court at once summoned her also as a witness. Otherwise, according to the Smritis reasonable adjournments could be given on sufficient grounds and under special circumstances. In Muslim law, for delay in the administration of justice even the judges could be liable to compensation.

46. Dr. Versy Fitzerald, Muhammadan Law, p. 11.

47. Fraser, MS. 228, Oxford. In many treason cases sentence was remitted, Tuzzuk-e-Jahangir, by S. Ahmad, p. 62.

48. Sir J. N. Sirkar, Aurangzeb, pp. 122-130.

counterparts of the Muslim Muftis.[49] This practice was most clearly explained in the following passage quoted from the report of the Committee of Secrecy, appointed by the House of Commons[50] which recommended the retention of the same practice in Bengal : "And your Committee finds that the Gentoo (Non-Muslim) subjects enjoyed a similar privilege with respect to all cases of a religious nature in which persons of that persuation were parties ; for that in every such case, it was necessary that the temporal judge should be assisted by a Brahman of that caste, particularly when that cause was of such a nature as might be attended with the consequence of forfeiture of caste." The practice of consulting Paṇḍits in deciding cases on Hindu law was abolished only in 1868. The following proclamation issued by Akbar[51] will clearly indicate his non-interference with the Non-Muslims : "No man should be interferred with on account of his religion and every one should be allowed to change his religion if he liked. If a Hindu woman fell in love with a Mahomedan and changed her religion, she should be taken from him by force and given back to her family. People should not be molested if they wished to build churches or prayer-rooms or idol-temples or fire-temples."

5. The reasons for non-interference with Hindu personal law

The Sultans after ascending the throne of Delhi had very little time or opportunity to devote attention for the administration of justice in the country. They chose,[52] therefore, to leave the Hindu personal law alone—undisturbed and uniterrupted. It was not merely an accident. It was deemed to be an imperative necessity from the standpoint of politics for the sake of expediency. The Muslim law was, however, taken from Egypt or Turkey on the Abbaside models. In the word of Sir Jadu Nath, the Muslim administration of justice was of "Perso-Arabic origin" and the three important sources of Indo-Mahomedan[53] law, to wit, the Koran, juristic opinion and precedents were all "trans-Indian". The Muslim rulers did not interfere with the personal laws of the Hindus ; on the contrary, they adopted many time-honoured principles and institutions of the Hindus.[54]

49. Sir J. N. Sarkar, Mughal Administration, p. 37.
50. Vol. IV, p. 234 (1772-1773).
51. Ain-e-Akbari, Blochmann, p. 207 (Tr.)
52. Sir J. N. Sarkar, Mughal Administration, p. 6,
53. *Ibid*, pp. 8-9.
54. *Ibid*, pp. 11-12.

6. Effect of Muslim rule on Hindu Law in Northern and Southern India

As regards the state of Hindu law in general and the influence of Muslim rule thereon Dr. Jolly[55] seeks to make some distinction[56] between Hindu law as it was administered in Northern India on the one hand and in Southern India on the other. He makes the distinction in connection with explaning the reasons of difference between the Dāyabhāga school and the Mitākṣarā school. Not only the Mitākṣarā but nearly all the really ancient commentaries and digests of note were composed in the Deccan. According to Sir J. N. Sarkar[57] also there is much information about the Hindu caste-courts and arbitration boards which administered justice according to common law. But they refer to Deccan only, where society was differently constituted from Northern India.

Subject to this difference between the conditions of Hindu law in Northern and Southern India and the points of mutual influence of the two systems of Hindu and the Mahomedan law, the Hindus were generally governed throughout the entire Mahomedan period by the pure Hindu Law so far as their civil matters were concerned. But so far criminal law was concerned, the law governing the Hindus and the Muslims was essentially the same except in canonical offences and punishment. The conceptions of crimes and their punishment were not only analogous but were also largely identical. The result was that there was only one system of criminal law which was supposed to be based on the tenets of Islam, but not differing in any material way from the Hindu law ; in other words there was no separate entity of Hindu criminal law from the Muslim period. After the advent of the British rulers there was of course a revival of Hindu civil law in the sense that it again came to be the law of the king's court and not only confined to the private tribunals or panchayats ; but the Hindu criminal law as such ceased to exist even from the beginning of the Muslim rule in India without any revival or resurrection even during the British period. As it has already been seen, the two different systems of criminal law among the Hindus and the Muslims merged into one which might be popularly described as the Indo-Muslim criminal law during the Muslim rule in India ; but this mixed system was again further modified and replaced by the Indian Penal Code and the elaborate Criminal Procedure Code which were based,

55. Outlines of an History of Hindu Law (Tagore Law Lectures, 1863), P. 24.

56. Cf. Bühler, Kashmere Report, pp. 50-52.

57. Mughal Administration, p. 116.

strictly speaking, neither on Hindu law nor on Muslim law exclusively. They were based on certain general principles of English law without any distinction between the Hindus and the Muslims.[58] On the above hypothesis of the so-called amalgamation or identification of the Hindu and the Muslim criminal laws, I shall briefly refer to some conspicuous features of this mixed type of law which might be treated virtually as an appendix to the Hindu criminal law, as actually administered during the Mahomedan rule.

7. Some important features of justice as administered during the Muslim rule

Administration of justice was regarded as a special responsibility of the Muslim rulers like the Hindu kings. The prophet is reported to have said that a moment spent in the dispensation of justice was better than seventy years of devotion.[59] A dominion can subsist inspite of misbelief, but it cannot endure with the existence of injustice.[60] Firuj Shah proclaimed that all his energy was directed towards the maintenance of justice in the four corners of his empire. The mode of administering justice during the Mahomedan period was simple, speedy and without any elaborate law of procedure.[61] Jahangir and othe Mughal emperors had tied with a chain of gold, a box wherein the people could lodge their complaints without unnecessary delay and harassment by the court people. Justice had to be done speedily. Justice delayed was literally treated as justice denied. In case of unreasonable delay, even the judges and the Qazis had to compensate the parties. The Qazis were definitely instructed to use their reason and discretion in deciding disputes—without relying too rigidly on the letters of the law. The emperor Akbar also placed no reliance on testimony or oaths which were the resources of the crafty; he drew his conclusions "from the contradictions in the narrative, the physiognomy and some sublime researches and noble conjectures".[62] Sometimes extra-ordinary procedure would be adopted to find out the truth most successfully. An interesting decision was thus made by the emperor Shahjahan: "A Hindu scribe sued a Mughal soldier for having enticed away his wife. The wife denied that the complainant was her husband; but the court (Shahjahan) not satisfied with her statement suddenly ordered her to fill the court ink-pot with ink. The woman did the work most

58. Some special provision was, however, made in favour of the Europeans.

59. Sirat-i-Firuj Shahi, p. 161.

60. Siyasatnamah, p. 8.

61. Medieval India, p. 433.

62. Ain-i-Akbari, III, 257.

dexterously and the court concluded that she was the wife of the Hindu scribe". Litigation was never encouraged. Capital sentence required the sanction of the king for execution. The king did not like to vest much powers in the hands of the Qazis and magistrates for fear of corruption.[63] Generally speaking there was wonderful and essential justice. Even close friends, Amirs and Omarahs of the kings could not escape punishment if and when found guilty. There were different kinds of punishments including capital sentence. It is said of Muhammad Tughlaq that one day he enquired of Ziauddin Barni as to in what cases capital punishment could be inflicted and he said[64],—"In three cases according to the Qoran. Firstly, apostacy, secondly, shedding of innocent blood and thirdly adultery." Muhammed Tughlaq replied, "All this may be true, but mankind has become much worse since those laws were made." It was Muhammad Tughlaq again who flayed alive a man convicted of treason and exhibited his dead body in public while the executioner was ordered to proclaim,—"Thus shall all traitors to their kings perish."[65] There were 25 cases of capital sentences in the reigns of Akbar, Jahangir and Shahjahan ; of these five were trampled under feet of elephants, one strangled and the rest beheaded or hanged. A typical case of punishing a thief by Jahangir[66] may be cited in this connection. "The thief had committed several thefts before and each time they had cut off one of his members— once his right hand, the second time the thumb of his left hand, the third time his left ear and the fourth time they hamstringed him and the last time his nose ; with all these he did not give up his business and yesterday entered the house of a grass-seller in order to steal. By chance the owner of the house was on the look out and seized him. The thief wounded the grass-seller several times with a knife and killed him. In the uproar and confusion his relations attacked the thief and caught him. I ordered them to hand over the thief to the relations of the deceased so that they might retaliate on him." The criminal code was severe and the punishment was deterrent. Cruel forms of punishment were supposed to have been borrowed from the Byzantine empire towards the close of the 11th century according to Barni.

No Non-Muslim could be appointed a judge or Qazi as in Hindu law a Non-Brahmin could not be appointed a judge. But Alzayli recommended the appointment of Non-Muslims as judges and magistrates to decide their own disputes.[67] Generally a Non-Muslim could not be a

63. See ante . the case of Abdul Wahab Borah the first chief Qazi of Aurangzeb.
64. Beveridge, I, p. 90.
65. *Ibid.*
66. Tuzuk-i-Jahangir.
67. Durrul Mukhtar, p. 521.

witness against a Muslim ; but in actual practice this was not rigidly followed. Iltutmish for the first time introduced the system of employing Paṇḍits to expound Hindu Law for the Hindus on the Abbaside model.[68] Village Panchayats[69] could try cases of local character. The number of witnesses was not insisted upon though generally four witnesses were required to prove adultery[70] and two witnesses for adjudging a man insolvent.[71] Truthful witnesses were preferred, a Muslim who was convicted for heinous crimes could not be a witness, whereas conviction for treason[72] also could be based on the evidence of a single Hindu witness. In a case[73] for attempt to commit murder the evidence of one witness was regarded as sufficient while the similar evidence of one witness was rejected in the case of Sidi Mowla.[74] Documents were not preferred to oral evidence.[75] The case was otherwise in ancient Hindu Law where document was regarded as a very helpful contrivance ever conceived by human genius.[75a] The early Caliphs also preferred oral evidence to documentary evidence. Compromise was encouraged.[76] Trials by ordeals were prohibited under Muslim law and the Sultans and the emperors also did not favour them ; of course, they did not interfere with its use among the Non-Muslims. As cases between the Hindus were decided by the learned Brahmins and not by Muslim Qazis, so if it was necessary to have recourse to ordeals they should put heated irons into the hands of the accused person who was guilty, if his hands were burnt, but innocent, if not, or they should put the hands of the accused in hot liquid butter ; or the accused should jump into water and if he came to the surface before an arrow had returned to the ground which had been shot off when the man jumped into the water, he was guilty.[77] There are indications that some sort of legal practitioners existed specially at the time of Shahjahan and Aurangzeb. The term used for lawyer was Vakil which literally means an agent. According to Omar,

68. Ameer Ali, History of the Saracens, pp. 188, 422.

69. Briggs, III, p. 420. Panchayat was usually an assembly of five men entrusted with the administration of justice. Its president was known as Moqoddam, Mirat, 1. p. 49. Alamgirnamah, 595 ; Dow, III, p. 58.

70. Hidayah, p. 353.

71. Al-Qaza-fil-Islam. p. 60.

72. Elphinstone, (1857), p. 356.

73. Briggs, IV, p. 517.

74. Barni, p. 211 ; Badaoni, I, p. 171.

75. Al Qaza-fil-Islam, p. 80.

75a. Vide ante, Chapter VII.

76. *Ibid*, 20.

77. Badaoni, II, p. 356 ; Ain-i-Akbari, p. 205 (Translated by Blochmann and Jarret.)

the second Caliph of Islam, "the practice of law was to be in good faith and pursued in sincerity as a calling.[78] The courts were not confined to mere evidence. They could either themselves[79] or through agents make some enquiry regarding the truth or otherwise of a case.[80] This practice was started by the Abbaside[81] Caliphs and was followed by the Sultans and the emperors of Delhi. In Kauṭilya also we find that spies were employed to report on the actual occurrence of a case *sub judice*. Alexander Dow[82] says of Jahangir that "he often disappeared in the evening from the palace and dived into obscure punch-houses to pass some hours in drinking and talking with the lower sort, and thereby getting first-hand information to make up his mind for deciding a case."

It has been most appropriately said by Hamilton,[83] in 1780 "that many centuries have elapsed since the Musalman conquerors of India established in it together with their religion and general maxims of government, the practice of their courts of justice."[84]

8. Administration of justice by the Mughal emperors

As it has already been noticed, the Sultans after ascending the throne of Delhi had very little time and opportunity to devote attention for the administration of justice or its organisation. They chose, therefore, to leave the Hindu personal law alone—undisturbed and uninterrupted. They introduced and maintained Islamic law in the general administration of justice. This Islamic law, however, was taken from Egypt or Turkey on the Abbaside model. Generally speaking, the Mughal emperors also followed the Sultans in many respects. As a matter of fact there was hardly any regular and systematic machinery for the administration of justice during the rules of the Sultans ; of course, occasionally cases were tried by the Sultans themselves or by some royal firmans issued to the provincial governors. Sher Shah undoubtedly made some valuable contribution in the matter of administration in general and the administration of justice in particular. But after his death the system did not survive long. Similarly during the rules of Babar and Humayun there was hardly any attention bestowed upon the administration of justice in the

78. The high standard might be compared with that of a Juris consult of the conception of Ulpian.

79. Tuzuk-i-Jahangir, p. 306.

80. Ain-i-Akbari, I, 53. (Blochmann and Jarett).

81. Journal of the Royal Asiatic Society (1910), p. 794.

82. Vol. III, p. 102.

83. Hidayah, p. XV.

84. Muhammadan Law by Sale, p. XV.

country except that these emperors chose to decide some cases in camps in the most summary way without any reference to any regular code or procedure. Some cases have been narrated in the Humayun Nama by Gulbadan Begum, but these cases are more or less connected with rebellion against the very political supremacy of the emperors themselves. Whatever might be the conditions of the administration of justice during the reigns of the Sultans and the first two emperors Babar and Humayun, there is not the least doubt that the machinery for administering justice in the country became more and more regular, systematic and methodical during the reigns of the emperors Akbar, Jahangir, Shahjahan and Aurangzeb—all of whom were highly eminent in the sphere of administering justice and equity to all concerned without any discrimination of caste or creed and rank or position.

9. **Akbar**

Akbar was not only a great ruler but he was also a great administrator of justice and equity. According to him justice was the divine element in monarchy.[85] "If I were guilty of an unjust act, says Akbar,[86] "I would rise in judgment against myself. What shall I say then of my sons, my kindred and others ?" The emperor himself was to try all capital cases and other highly important cases. Those who were convicted for having committed any capital offence would be either crushed by elephants, impaled or hanged. He had a peculiar hatred for adultery and debauchery. "Neither influence nor entreaties nor great ransom which was offered would induce him to pardon his chief trade commissioner, who although he was already married had violently debauched a well-born Brahmin girl. The wretch was by the king's order remorselessly strangled."[87] No judgment was recorded in writing, it was delivered only verbally. Akbar was always in favour of reformatory punishment as far as possible. Hence he would always instruct his Deputy that "he should strive to reclaim the disobedient by good advice. If that fails, let him be punished with reprimands, threats, imprisonments, stripes or even amputation of limbs, but he shall not take away life till after the most mature deliberation. Let those who apply for justice, not be inflicted with delay and expectation. Let him shut his eyes against offences and accept the excuse of the penitent. Let him object to no one on account of his religion or sect."[88] In order to

85. Abul-Fazl's Ain-i-Akbari, translated by H. Blochman, Vol. III, p. 399.

86. Jarrett's Ain, Vol. III, p. 387.

87. Commentary of Father Monserrate, p. 210. This commentary gives an interesting account about the administration of justice by the emperor Akbar.

88. Ain-i-Akbari, Vol. II, translated by Jarrett, pp. 37-38 See also Gladwin, p 254.

inspire awe and terror in the mind of the actual and the intending criminals different kinds of instruments for punishment would be kept in the palace. This was also more for avoidance and corrections of offences than for actual punishment. Thus the chief executioner "is equipped even in the palace and before the king with many instruments of punishment, such as leather thongs, whips, bow strings, fitted with sharp spikes of copper, a smooth block of wood used for pounding the criminal's sides or crushing to pieces his skull and scourges in which are tied a number of small balls studded with sharp bronze nails. However, no one is actually punished with these instruments which seem to be intended rather to inspire terror than for actual use. For the same reasons various kinds of chain manacles, handcuffs and other irons are hung up on one of the palace gateways, which is guarded by the aforementioned Chief Executioner."

Akbar evinced a very high standard for administering justice when he used to insist upon clear finding by thorough investigation without merely relying upon ordinary routine evidence. Particularly Akbar had little confidence in the witnesses and oaths that they would take. Akbar himself would not spare any pain to thoroughly investigate into an allegation from all possible angles of vision for arriving at a true finding and he would insist on his representative also to be equally circumspect in the matter of administering justice. Thus the emperor insisted that "in judicial investigation he should not be satisfied with witnesses and oaths but pursue them by manifold inquiries, by the study of phisiognomy and the exercise of foresight; not laying the burden of it on others live absolved from solitude."[89] Abul Fazl also corroborates the above as in his opinion also "the delegate must not be satisfied with witnesses and oaths but make diligent investigation, because it is very difficult to come at truth without painful search and minute enquiry. Considering the depravity of human nature, he ought not to place much reliance on deposition. Divesting himself of partiality and avarice let him distinguish the oppressed from the oppressor; and when he has discovered the truth act accordingly. He shall begin with asking the circumstances of the case and then try it in all its parts. He must examine each witness separately upon the same point and write down their respective evidences. Since these objects can only be effectually obtained by deliberateness, intelligence and deep

Mirat-i-Ahmadi (p. 174) preserves a letter of instruction issued to the governor of Gujrat restricting his punishment to the putting in irons, whipping and death enjoining him to be sparing in capital punishment and except in cases of dangerous sedition to inflict none until he has sent the proceedings to the court and received the emperor's confirmation.

89. Ain-i-Akbari, Ain I, Vol. II, p. 37.

reflection, they will sometimes require that the cause should be tried again from the beginning and from similarity or disagreement, he may be enabled to arrive at the truth."[90] Mannuci also[91] used to complain that inspite of the best exertions, the country was full of false witnesses[92] and forgers who could even deceive the emperor. False documents could be easily fabricated and false statements could be made by the people most unhesitatingly.[93] Though otherwise Akbar had a very high standard of justice to be scrupulously followed by himself as well as his delegates, still he was not always above all human frailties. Sometimes he would be unduly influenced by wrath and passion to inflict the most unexpected punishment, following the most irregular procedure. In the result too severe and inhuman a punishment would be meted out for only a minor offence. This could, however, be possible as there was no fixed written code or procedure like our modern Indian Penal Code or the Criminal Procedure Code. The emperors could follow their own discretion—unbounded and unfettered in nature, in convicting and devising punishments. One such case is regarding a negligent "lamp-lighter" who was hurled down from the battlements of the palace and dashed to pieces for a very minor offence,[94] if it could be called an offence at all.

Akbar's impartiality in doing justice was almost proverbial. It has been rightly said by Abul Fazl, "His Majesty.........in his courts makes no difference between a relative and a stranger and no distinction between a chief of chiefs and a tangle-haired beggar."[95] It is said that in the 24th year of his reign one of the king's favourite governor and boyhood-mate Khan-i-Azam Mirza Aziz Koka arrested one Amil, Alauddin by name, for embezzlement of government money. After his arrest, the Amil was made over to a servant who having some old and personal grudge against him beat him to death. Though there was no complaint from anybody, the governor sentenced the servant to death on account of "Piety of God." The matter did not end there, though the real culprit was given the extreme punishment of law. Subsequently, however, the father

90. *Ibid*, Ain. III, p. 41, translated by Jarrett.

91. Storia Du Mogor, p. 262.

92. The ancient Hindu jurists like Nārada and others also were very particular in providing that every case should be thoroughly investigated and adjudicated by applying law, reason and equity. They also enunciated many useful criteria for distinguishing truthful and untruthful witnesses.

93. Abul Fazl gives an account of Akbar's daily routine with special reference to the administration of justice.

94. Elliot, Vol. VI, p. 164. In the same volume, there is another incident in connection with the summary punishment inflicted upon the emperor's foster brother Adham Khan.

95. Akbar Nama, p. 66 ; also see Beveridge, p. 387.

of the deceased came from Persia to demand justice when the case was re-opened by the emperor Akbar who ordered the case to be tried *de novo* with the help of a regular court of justice. However, in course of that trial, the governor had the case compromised by paying a large sum of money as compensation to the father of the complainant.[96]

In another case Akbar took a very bold[97] and impartial step when he punished with death Jujhar Khan of Gujrat who was one of the most powerful military chief of the locality. The allegation was that this Jujhar Khan murdered one Changez Khan. The complaint was lodged by the mother of the deceased during Akbar's stay there. Akbar made necessary investigations into all the items of the allegations and was perfectly satisfied that the offence of murder was committed by the chief. Akbar unhesitatingly[98] sentenced him to death. It has been rightly said that "the old and deserted woman never imagined that so powerful a man would he punished for misdeeds and was astonished on beholding such justice. The general public also received enlightenment from this just sentence."[99]

10. **Jahangir**

Like Akbar and other Mughal emperors, Jahangir also had a great love for administration of justice. Administration of justice was as it were a part of his very life and religion. He scrupulously followed the practice of adjudging cases even when he was out in connection with expeditions or pleasure-trips or even when he was in pain or sorrow or was indisposed.[100] Jahangir also was responsible for having installed a golden chain of justice. "It was a chain of pure gold thirty gaz in length and containing sixty bells. If the officers of the courts of justice should fail in the investigation of the complaint of the oppressed and in granting them redress, the injured persons might come to this chain and shake it and so give notice of their wrongs. One end of it they made fast to the battlements of the Shah Nurj of the fort at Agra and the other to a stone post fixed on the bank of the river."[101] This innovation was undoubtedly one of the earliest means by which even a man of the street could at once succeed in drawing the personal attention of the emperor

96. The Shara' permitted the acceptance of fine or Kunbana in case of murders.

97. This case was tried by Akbar only in the 18th year of his reign.

98. For the other great virtues and qualifications of Akbar, see "The Emperor Akbar" by Noer, Vol. I, preface, p. III.

99. Akbar Nama, eighteenth year, p. 3. See also Beveridge, p. 46.

100. Memoirs, Translated by Rogers and Beveridge, Vol. I, p. 7.

101. History of Kafi Khan, as cited by Beni Parshad, p. III.

to his grievance, if any. More or less in every system of law, both ancient and modern, various steps have to be taken only to set the machinery of legal administration in motion—not to speak of the time that might be taken in actual adjudication of the allegations. In both these respects the systems of the Mughal emperors particularly that of Jahangir was extremely expedient. The system underlined by the "golden chain" was an exemplary one, as it was a very powerful instrument in putting end to all sorts of injustice and oppression by the government officers belonging to the different ranks and grades. This peculiar institution of Jahangir was unequivocally praised by every one as any grievance could be brought to the ears of the emperor direct through the bells of the golden chain. According to a persian manuscript "Razul Maluk" there is a fictitious story about a donkey which while roaming on the river bank one day chanced to shake the golden chain. An enquiry was readily made and it was found that the donkey was not properly cared for by its master—who was in the result warned so that better treatment might be meted out to the complainant." Like Akbar, Jahangir also sometimes used to go beyond the usual limits of law in fits of anger and passion. He took a sort of special delight in seeing culprits executed and torn to pieces by elephants and lions.[102] Jahangir was regarded not perhaps without reasons, by Terry as a man of extremes,"Cruel as well as wild, given to excessive drinking himself but punishing that fault in others."[103] Trials were concluded speedily and the executions were carried out in market places. Terry further holds, "I could never hear of laws written among them. The king and his substitute's will is law. The governors in cities and provinces proceed in like form of justice"[104] Sir Thomas Roe[105] also corroborates Terry. De Laet[106] gives a very interesting account of the method of administration of justice by Jahangir.

According to William Finch in case the allegations of a complaint could not be substantiated, he would be punished for having unnecessarily troubled the emperor by pulling the chain of justice.[107] Any person pulling the golden chain would at once be called before the emperor to explain his case.[108] Jahangir also was famous for his impartial justice. He did not

102. Hawkins in Purcha's Pilgrim, Vol. III, pp. 38, 41.

103. Early Travellers in India by Foster, p. 331.

104. *Ibid*, p. 326.

105. Embassy of Sir Thomas Roe, p. 120.

106. The Empire of the great Mughul, by De Laet, Translated by Hoyland and Banerjee, p. 93.

107. Finch in Purcha's Pilgrims, Vol. IV, p. 74.

108. Hawkins in Purcha's Pilgrims, Vol. III, pp. 43-44,

make any discrimination between friend or foe and the rich and the poor. Having ordered the execution of Hoshang who was a nephew of a great and influential noble Khan Alam, he exclaimed, "God forbid that in such affairs I should consider princes and far less that I should consider Amir."[109] He was not in favour of unnecessarily detaining any man in prison beyond the reasonable bounds of usual imprisonment. On one occasion he visited the Ranthambor fort and examined the cases of the prisoners for issuing final orders.[110] He would not hesitate to chastise even the great nobles themselves. When he received information that the eunuchs of Said Khan Chagtar were oppressing the poor, he at once sent message to him warning that he would not be slow to inflict punishment even on him if the oppressions were again repeated.[111] Mannuci says that if any official went wrong in the matter of administration of justice, he would be thrown in front of the lions which were kept in the Hall of Audience.[112]

Jahangir forbade the cutting of noses and ears and blinding as forms of punishment. Similar rules were embodied in Ain-i-Jahangir. In 1618, Jahangir issued orders that no capital punishment should be executed until the sunset. The order was the result of an unpleasant incident. On one occasion Jahangir sentenced a prisoner to death. The sentence was as usual executed. But due to the special request of a courtier, the emperor was pleased to pardon that man. But when the order of pardon was going to be communicated it was seen that the prisoner had already been executed. So the order was issued "that hence forth criminals sentenced to death should not be executed till sunset and if until then no reprieve was issued, the punishment should be inflicted." Mricchakaṭikam,[113] a Sanskrit drama; ascribed to the writer Śūdraka discloses a similar provision when the hero of the drama Cārudatta sentenced to death was being taken to the execution ground. One of the executioners was thinking of some reprieve that might happen to come.

11. Shahjahan

Shahjahan's reign was conspicuous for peace and prosperity. He had a very efficient system of judicial administration. His sense of justice was

109. Memoirs, Trnslated by Rogers and Beveridge, Vol. II, p. 211.

110. *Ibid.*, Vol. II, p. 59.

111. *Ibid.*, Vol. I, p. 13.

112. Storia Du Mogor, by Mannuci, Vol. I, p. 174. Mannuci has narrated many stories about and cases disposed of by the emperor Jahangir.

113. See the trial scene. The prisoner Cārudatta was ultimately saved from the execution due to the physical appearance of Vasantasenā who was alleged to have been murdered by him. A political revolution or upheaval also took place in the country involving the change of the king.

very stern and impartial. Even the officials were subject to rather unusually cruel punishment for any act of oppression on the subjects. He used to keep in his court baskets full of poisonous snakes. The officers guilty of oppression and tyranny were to be bitten by these snakes. They would not be removed from his presence until they breathed their last. This stern sense of justice and impartiality had a very salutory effect so much so that there was paucity of offences during the reign of Shahjahan.[114]

According to the author of the Badshah Nama also, Shahjahan devoted the whole of Wednesday in administering justice without holding the public Durbar on that day. From morning till noon he would decide disputes. In the Diwan-i-Khas at the Red Fort of Delhi, Shahjahan had a Meezan-i-Adl (balance of justice) painted on the wall. This would always inspire the sense of justice and impartiality while Shahjahan would go for holding courts for deciding disputes. He was also helped by the Muftis, Qazis and the Ulemas. Some nobles also usually attended his court.[115] The severity of Shahjahan's idea of punishment could be easily seen from the fact that sometimes thieves guilty of heinous offences were punished by hanging or transporation to the other side of the Indus.[116] Another peculiar method was followed by Shahjahan when he would compel the officials to compensate the injured persons when thieves escaped or when the stolen articles could not be recovered.[117] Similar provisions were found in the Arthaśāstra of Kauṭilya and the different Dharmsūtras and the Dharmaśāstras.

The most important contribution of Shahjahan was the establishment of a regular system of appeals and hierarchy of different grades of tribunals. From the courts of the first instance, appeal lay to the courts of the provincial governors or the Qazis of the Subhas. From their decisions again appeals could be preferred to the court of the Chief Diwan or the Chief Qazi in matters of law. The emperor had both original and appellate jurisdiction. Sometimes the emperor would send back the complaints to the governor for full investigation and disposal or for reference back to him for his personal decision.[118]

Mannuci[119] narrates many interesting decisions of the emperor both

114. Lubbut-i-Twarikh-i-Hind, by Rai Bhara Mal.

115. Badsha Nama, Vol. P. 150.

116. Storia Du Mogor, Vol. I, p. 203.

117. *Ibid.* In 1645, Shahjahan ordered the governor of Surat to compensate from his treasury the loss that was sustained by the Factory for looting. The governor did not heed to it until he was compelled by the emperor to do so.

118. Badsha Nama, Vol. I, p. 150.

119. Storia Du Mogor, Vol. I, P. 203.

original and appellate. In one appeal disposed of by Shahjahan the facts[120] were very interesting. In another case when a complaint was made against a noble by his servant alleging that no salary had been paid to him for a long time, the emperor summoned him. The servant was made to ride a horse and the master was ordered to run after him unless he was exhausted and fell down. The emperor admonished him to be just in future towards his servants.[121]

Shahjahan would every day spend sometime in administering justice. When he would go to the Jharoka-i-Darshan in the morning he would sometimes let down a string from the window so that people might tie down their complaints and petitions to it. This method made the access to the emperor very easy and absolutely uninterrupted by the court officials.

The emperor Shahjahan was very particular about prisoners so that they might not be detained unduly and for unusually long periods. He inspected the fort of Gwalior twice allowing an interval of five years with the result that after the second inspection there was no prisoner left in the fort. It was a matter of principle with Shahjahan to inspect all the prisons that might come on his way. The warders also were definitely instructed to bring to his notice the individual cases of the prisoners that happened to be in their charge. Again on an occasion when his daughter recovered from a serious illness, Shahjahan ordered the release of all the prisoners who were detained for debts which were ordered to be paid out of the treasury.[122]

12. **Aurangzeb**

Aurangzeb was one of the most ardent followers of Islam in administering justice with impartiality and equity according to the strict principles of Mahomedan law as enjoined by the Shara'.[123] He also tried to master the essential principles of Qoranic law from the writings of the different jurists, tradition and the commentaries. The account given by Bernier,[124] an eye-witness, about the administration of justice by the emperor Aurangzeb is really very instructive.

Mannuci[125] also gives an equally interesting account of the justice as administred by the emperor Aurangzeb. He was a scrupulous follower of

120. *Ibid.*
121. *Ibid.*, Vol. I, p. 201.
122. Badsha Nama, Vol. II. p. 363.
123 Elliot, Vol. VII, pp. 158-60.
124. P. 263.
125. Alamgir Nama, pp. 1096-97.

the Quran[126] and had very little consideration for the customs or the precedents of the country. Like his predecessors, Aurangzeb also reserved one day for administration of justice without holding any Durbar on that day. He would go on adjudicating cases from morning till noon in the Diwan-i-Khas in the presence of the Qazis, Muftis, Ulemas and the Kotwal.[127]

No body else was authorised to inflict capital punishment without the previous approval of the emperor sought and obtained. He wrote[128] in a very strong language to warn Feroze Jang who had one man executed on his own authority. During the time of Aurangzeb, as it was usual also with other Mughal emperors, judgments were executed and punishments inflicted on the very spot immediately after the announcement of the judgment. Aurangzeb himself firmly believed and also acted according to that belief that "he is the truly great king who makes it the chief business of his life to govern his subjects with equity"[129] Ovington rightly described Aurangzeb as the "main ocean of justice." He got informations about the methods of administration of his justice through the English merchants of Bombay and Surat. The emperor did not make any distinction of caste or creed, sect or community and rank or position. All persons were equal in his eyes.[130] According to Careri also, an Italian traveller, the emperor "supported by a staff[131] and surrounded by nobles received petitions, read them carefully and personally endorsed them." Aurangzeb was eager to do justice not only himself, but he was equally zealous to insist that all subordinate judicial officers also would be doing justice in compliance with strict discipline. Thus when it came to his notice that the judges of Gujrat would sit in the Adalat only for two days in the week to administer justice, he very strongly reprimanded them and compelled them to sit in courts for five days in the week, beginning the work in the morning and working up to noon. They were allowed to go home only at the time of the Zuhar prayers.[132] In 1702 the name of the Diwan-i-Adalat was changed into Diwan-i-Muzalim which literally means a court where the aggrieved or the oppressed persons could get justice,

126. Ahkam-i-Alamgiri, translated by Sir J. N. Sarkar in his Mughal Administration, p. 112.

127. Alamgir Nama, p. 1102.

128. See foot note 126 above.

129. Bernier, p. 168.

130. Voyage to Surat by Ovington p. 193.

131. Voyage Round the World by G Careri, Vol. I, pp. 222-23.

132. Mirat-i-Ahamdi, p. 291.

relief and redress.[133] Mannuci did not exaggerate when he said that "the prince (Aurangzeb) does his utmost to maintain in the eyes of the world, the prevailing opinion that he is zealous in the course of justice."[134] He further adds that inspite of his exertions "the country was full of false witnesses and people guilty of forgery who can even decieve the emperor." Aurangzeb spared no pains to investigate a case thoroughly and then come to a correct finding. Sometimes he could unearth many deep-seated conspiracy or well-meditated plan of fraud. On one occasion, he could discover the fraud of a Fakir[135] who was practising a peculiar fraud taking advantage of the religious sentiment of the people. This Fakir was really a soldier. He had a horse which had died. The Fakir had no further means to buy another horse. So what he did was that he buried the dead horse and began to worship the tomb as that of a great saint. Aurangzeb had suspicion in his mind and he had the tomb re-opened—only to see that it contained the bones of a dead horse. In the mean time the Fakir was collecting offerings from religious-minded people who were definitely misled by his pretended devoutness. Ultimately the Fakir was flogged and banished.

13. The Islamic conception of crime, punishment and evidence

As it has already been observed at the beginning of this chapter, the Muslim rulers left Hindu civil law alone and administered the selfsame criminal law for all the subjects—Hindus and Muslims without any discrimination. This condition of Muslim penal law continued until it was modified by the British administrators who ultimately replaced it by the Indian Penal Code and the Criminal Procedure Code. The gradual changes and modifications that were introduced by the Britishers will be noticed more elaborately while dealing with administration of Hindu law by the Britishers in some subsequent chapters.

As it has been evidenced by most of the illustrations noticed in the various contemporary documents, criminal law seems to have occupied a position of much greater importance in the administration of justice by the Mughal emperors who used to exercise their discretion in almost all the judgments passed and the punishments inflicted by them. There was practically no code for their guidance. Occasionally, of course, Akbar issued some Farmans, but they could by no means be regarded as codes by any stretch of imagination. The Fatwa-i-Jahangiri, of course, contained some rules but

133. Ma'asir-i-Alamgiri by Saqi, p. 460.

134. Storia Du Mogor, Vol. III, p. 262.

135. *Ibid*, Vol. II, p. 15.

they were also more administrative than strictly legal. The most important code of law ever promulgated by the Mughal emperors was the Fatwa-i-Alamgiri which was compiled at the instance and patronage of the emperor Aurangzeb. In this work, which was entrusted to the eminent scholar Sheik Nizam, an attempt was made to constitute a standard canon of law based on the essential principles of the Shara.' Fatwa-i-Alamgiri was undoubtedly the only written book of law worth mentioning. In 1672 Aurangzeb issued a Farman to the Governor of Gujrat. This might be regarded as the Penal Code of Aurangzeb. In it we find many rules regarding the administration of criminal justice, specially with respect to the imprisonment of culprits.

A minute examination of the rules of this Farman will reveal certain striking points of similarity and difference between Hindu and Muslim ideas of criminal law. Thus in the first place, during the Muslim rule, there were prisons where offenders could be detained. There are frequent references to the prisons of Gwalior, Ranthambor and other places. But there seems to have been no specified period, for which the offenders were to be detained. Almost all the Mughal emperors were very anxious to see that the prisoners might not be detained unduly for too long periods. The emperors themselves would examine the cases of prisoners individually and issue order for their release unless they were found to have committed serious political offences. There was no regular prison in ancient India during the time of the Dharamsūtras and the Dharmaśāstras. In stead of prison there were different grades of fines. In Muslim law again there was no question of fine. Thus Aurangzeb issued orders to the Diwan of Gujrat to the effect that realisation of fine was illegal according to the Shariat ; so every guilty Amil or Zemindar might be either imprisoned or dismissed or banished but never fined.[136]. Subject to these differences, there was provision both in ancient Hindu law and medieval Muslim law regarding corporal punishment including sentences of death.

In the second place, it appears that the Muslim conception of punishment was more often reformative, as it is indicated by the fact that offenders should be detained in prison until they are repentent. Thus it has got some similarity with the Hindu idea of prāyaścitta which was enjoined by the scriptures in addition to whatever legal punishment could be inflicted.

136. Mirat-i-Ahmadi, p. 310.

In the third place, habitual offenders were liable to heavier punishment according to both the Hindu and the Muslim systems of criminal law.

In the ancient Hindu law, caste played a very important part and the Brahmins were not liable to any corporal or capital punishment. But no such distinction of caste or position was ever to be seen in Muslim criminal jurisprudence. The Islamic law of crimes was crude and archaic, the law of punishment was horrible and inhuman and the law of evidence was artificial and technical. There was hardly any distinction between public and private law. The conception of crimes being offences against the state was not yet recognised. Offences like drunkenness and adultery were regarded as offences against God and offences like murder and robbery were regarded as offences against men. Thus even murders and homicides were regarded as private grievances compoundable and pardonable by the relations of the deceased. The private individuals could claim "Kisa" as a matter of right—"hakadmi". The rule proved sometimes so irrational and preposterous that even by collusion and conspiracy even a man might profit by his own wrong. Suppose, for instance, there are two brothers and one of the brothers murders the father. The other brother pardons the murderer. The result is that both the brothers would be profitting by the murder. Again among the Hindus the position became much more ludicrous. If a Brahmin would commit any murder of a Hindu, none of the kinsmen of the deceased would insist on the capital punishment of the Brahmin murderer, as thereby they would themselves be guilty of killing a Brahmin which would constitute a mahāpātaka. Many such instances were to be found in the Bengal Revenue Consultations of the 11th November, 1789. And human life became so cheap that murders could be compounded by paying compensations of eighty, thirty, twenty or even ten rupees. Again no capital punishment could be inflicted if the deceased had no heir or where the relatives were not coming forward knowingly or unknowingly for demanding the capital sentence for the murderer. And if compensation was accepted by one of the relations, the rest could never insist on the capital punishment ; they had to remain contended simply with proportionate shares of "Kisa." Parents and grand-parents could not be capitally punished for the killing of their children or grand-children.

The most illogical distinction was made between wilful murder (Amd) and culpable homicide not amounting to murder (Sabih Amd). This distinction was not based on the presence or absence of intention ; but it was based on the nature of the instrument used. If the instrument is sharp and cutting, it will be murder ; if otherwise, it will be simply culpable homicide not amounting to murder. Warren Hastings refers to a very

interesting case. A man held the head of a child under water till it was suffocated and when it died he made a prize of its clothes and the little ornaments of silver which it wore. It was evident that his object was no more than robbery and murder was the means both of perpetrating and concealing it. The extraordinary manner in which the murder was committed, it may be suspected, was suggested to him by the distinction in the cases of homicide by the principle of Mahomedan law in question by which he was liable to no severer retribution than for the simple robbery ; whereas he would be sentenced to suffer death had he killed the deceased with a knife or a sword although he might have been impelled to it by sudden passion and not pre-meditated design. Yet for his horried and deliberate act he is pronounced guilty of man-slaughter only and condemned to pay the price of blood which seems invariably fixed at Rs. 3333-5-4".

The above distinction was made by the jurist Abu Hanifa whose theory was not, however, unchallenged though he was regarded as the undisputed authority for Bengal. Again the death sentence on the murderer was to be executed by the kinsmen of the deceased. Warren Hastings was justified in commenting on this aspect of the Muslim criminal law : "This law is still more barbarous and in its consequences more impotent. It would be difficult to put a case in which its absurdity should be more strongly illustrated than in one now before us, of a mother condemned to perish by the hands of her own children for the murder of her husband. Their age is not recorded, but by the circumstances which appear in the proceedings, they appear to be very young. They have pardoned their mother. They would have deserved death themselves if they had been so utterly devoid of every feeling of humanity as to have been able to administer it to her who gave them life."

The punishment in Muslim law was broadly classified as Hadd, Kisa, Diya and Tazir. Hadd literally means boundary or limit. In this case there were scheduled punishments for sheduled offences and the judges could not modify or alter them in any way. Thus instances of Hadd may be seen in the punishments of stoning or scourging for Zina or illicit intercourse; amputation of hands for theft and scourging for false accusation of adultery against a woman. Kisa means retaliation. According to this principle, wilful killing and some kinds of grievous hurts and maiming entitled the injured person or his relations to inflict the same injury on the wrong-doer. This is otherwise known as the *Lex Talionis* which was found (as it has already been seen in chapter IV, ante) in its extreme form in ancient Babylonian Law.

Diya was the "blood-money" or money compensation which could be accepted in lieu of the retaliation.

Tazir means the discretionary punishments. There was no specification of this punishment either in quality or in quantity. Sometimes even new punishments or new modes of punishments could be devised by the judges and the kings. The list of Tazir was quite elaborate in the actual infliction of punishment for crimes.

The Muslim law of evidence was peculiarly artificial; hence conviction in many cases would become impossible or difficult. The evidence of an un-believer could not lead to the capital sentence. In other cases the testimony of one Muslim was regarded as equivalent to that of two Hindus. Again the evidence of one man was equal to the evidence of two women. The fixed number of witnesses also was insisted upon in Muslim Law. For conviction in a rape case, the evidence of four eye-witnesses was necessary. This would mean that such evidence would be next to impossible. For theft again there must be two witnesses subject to the general rule that one man was equal to two women. In actual cases there were many difficulties to adduce sufficient evidence for conviction. Direct evidence was always insisted upon and there might be innumerable circumstances giving rise to suspicion or doubt regarding the culpability of the offender. Thus it was observed by a Magistrate of Purnea that "the Mahomedan law seems more adopted to offer redress to the party aggrieved than to inflict chastisement on the criminal and make an example to deter others." In any case, convictions could not be secured too readily. On the whole, the actual application of the Muslim criminal law was not as atrocious as it might appear at the first sight. It was thus supposed that "as a system, the Mahomedan law of crimes is mild, for though some of the principles it sanctions be barbarous[137] and cruel, yet not only is the infliction of them rarely rendered compulsory on the Magistrate, but the law seems to have been framed with more care to provide for the escape of the criminals than to found convictions on sufficient evidence and to secure the adequate punishment for offenders."[138]

137. The Muslim criminal law also sanctioned mutitlations as forms of cruel and terrible punishments. According to the Smriti literature also punishments by cutting off hands or tongues were inflicted as punishments specially for the S'ūdras who could have the audacity to abuse or hurt a Brahmin or recite the text of the Vedas. Mutilation was to be found in more or less all the systems of law—ancient and medieval. The criminal law of the Muslims ruled India including the Hindus and the Mahomedans until it was substantially amended and modified and ultimately replaced by Indian Penal Code and the Criminal Procedure Code. This part of the legal history will be discussed in subsequent chapters.

138. Parl. Papers, 1831-32. Vol. XII. 696.

On account of the Tazir or discretionary form of punishment there always remained the chance of sentence being either unduly severe or ridiculously lenient. Thus in 1802, the Judges of the Murshidabad Court of Circuit not unjustifiably made this following comment on the then state of affairs: "We are of opinion, that from the discretionary mode in which the Mahomedan criminal law is adminstered, the administration of it admits both of too much lenity and too much severity......at any rate too much uncertainty. An offence which to one law officer may appear sufficiently punished by a month's imprisonment shall from another law officer incur a sentence of three or more years. Even in the henious crime of gang robbery our records will show sometimes a sentence of fourteen years' transportation and sometimes only two years' confinement."

14. Constitution and function of courts as they existed just after the assumption of Diwani in 1765.

The name of Islamic Jurisprudence was Fiqh,[139] based on the Quran which was the ultimate source of Islamic religion and law.[140] In theory, a Non-Muslim had no right to full citizenship ; but there was some divergence[141] between this theory and the practice. "Hence the Hindus," writes Grady, "enjoyed under the Mussulman Government, a complete indulgence with regard to the rites and ceremonies of their religion, as well as with respect to the various privileges and immunities—in matters of property—and in all other temporal concerns—the Mussulman law gave the rule of dicision excepting where both parties were Hindus, in which case the point was referred to the judgment of the Puudits or Hindu lawyers." The same view was shared by Von Kremer.[142] Under the early Arab conquerors, the Khalifa or his Governor used to appoint the Qazi either verbally or in writing insisting on certain conditions[143] of appointment and enumerating certain duties[144] to be performed by him. According to the central Mughal judicial system also, the emperor like the Khalifa was the supreme judicial authority as he "was the highest court of appeal and sometimes acted as a court of the first instance too". Besides the emperor, there was the Chief Qazi and the Diwan-i-Ala. There were also the Daroga-i-Adalat[145] and the Chief

139. The literal meaning of the term was intelligence or knowledge.

140. James Bryce, Studies in History and Jurisprudence, Vol. II, p. 219.

141. Hedaya, (Ed. Hamilton and Grady), p. XIV.

142. The Orient under the Caliphs, pp. 217-18.

143. *Ibid*, pp. 284-86 ; Hedaya, (Ed. Hamilton and Grady), pp. 334-35.

144. *Ibid* ; according to Hanifa, a woman also might be a judge.

145. Seir Mutaqherin, Vol. III, p. 168. The Darogha-i-Adalat was to afford "instant relief to poor, defenceless and weak people as could not at all times and for every subject resort to the ministers and to the emperors".

Sadr.[146] The administration of justice in the provinces[147] was a "miniature of the central system", the Nazim being the Vicegerent of the sovereign in the province. Like the Daroga-i-Adalat of the centre, the provincial Diwan[148] also had his Daroga for civil causes. Every province had thus the following officers who were concerned with the administration of justice, law and order. There was the Qazi who was the judge of canon law—civil and criminal ; there was the Muhtesib who might be regarded as the Censor of public morals and Superintendent of weights and measures; there was the Sadr who was in charge of religion and charitable endowments ; there was also the Kotwal and the Bakshi, the former being the Prefect and the Superintendent of the city police and the Municipal office and the latter being the Pay Master General. Moreover there was a number of Wakiya-Navis (news reporters), the Khufia Navis (spies) and the Harkaras (news agents). The provinces in their turn were divided into sarkars[149] which were subdivided into parganas.[150]

The Muslim Qazis sometimes used to announce curious judgment. Reference to one such judgment was made by Manucci : There was a woman who came to him (Qazi Abdul Wahab) requiring the condemnation of a young man then in custody for having slain her husband. The Qazi in a mild tone counselled her to forgive and if she would listen to him he would advise her to marry the man or some one else should she object to having the murderer. The woman consented to the proposal. The young

146 The offices of the Chief Qazi and the Chief Sadr were combined into one. (Vide Dr. P. Saran's Provincial Govt. of the Mughals, pp. 343-44).

147. Thus four courts of the Nazim, the Diwan, the Daroga-i-Adalat and the Qazi existed at Murshidabad before the assumption of the Diwani by the East India Company in 1765. (Vide Proceedings of the Committee of Circuit at Kashimbazar, communicated to the President and Council at Fort William, 15 August, 1772 and also the Proceedings of the Committee of Circuit of Kashim bazar Vol, (1-3) pp 118-120, Cf. the Seventh Report of the Committee of Secrecy (1773), pp. 346-48).

148 Cf. Indian Office MSS 3597, referred to by Dr. P Saran in his Provincial Government of Mughals, p. 344. Vide also C. D. Field, Introduction to the Regulation of the Bengal Code, (Second Edition), p. 2.

149. Besides the principal officers, the Faujdar, the Qazi, the Kotwal and the Amil, each Sarkar had a Sadr, a Bakshi, a Muhtesib, the Qanango, the Amin and the news reporter.

150. The principal officers of the Paragana were the Shikdar, the Qazi and the Pargana Amil.

A complete picture of the different kinds of courts in the provinces and the districts can be gathered from a letter written by Verelst on September 13, 17.5 to the President and Council at Fort William (Vide Verelst, View of the English Government in Bengal, Appendix, pp. 219-220). There was one superior revenue court named Sudder Cutchery and an inferior revenue court named Amin Duftar ; for criminal cases there were Foujdary courts and for civil cases there were Burrah Adalats and Chota Adalats besides the Bazee Zemeen Dufter.

man was released and she married him. Seeing this easy way of proceeding, I took the liberty to say to the Qazi that the sentence he had announced was likely to be the cause of several murders, for there being many women who were not content with their husbands, they would procure their murder by the hand of their lovers in order to marry again at once with the latter. He admitted the force of what I said, but he made believe to laugh at it and said it was a charity to secure a benefit to the young man and save his life. But if the woman had persisted in her complaint, he would have condemned him to death".[151]

Another interesting case was referred to by the author of Siyar-ul-mutakherin.[152] Rumbold was naturally surprised at the decision which was beyond his comprehension. He could very well understand the fine that was imposed on the person who was found guilty of an impertinent behaviour. "It is punishing his infidelity", he exclaimed, "but what I cannot understand is that a fine should be levied also on him who has the right on his side and was guiltless."[153] The administration of justice during the Muslim rule as a whole had certain glaring defects. In the first place, the Muslim Law being inseparably connected with the Muslim religion could not be applicable to the Non-Muslims; in the second place, no precision even of the Quranic law also could be expected, as the profession of law was in the hands of men who derived their "knowledge by inheritance or possessed it by intuition without any previous study or application"[154]; in the third place, the courts would not maintain any register of the proceedings at all, the usual consequences being that even the self-same cause could be tried more than once according to the interests of the parties concerned and lastly, the heavy fee in the form of Chauth or one-fourth of the total amount decreed, was another very vital consideration for which most of the people usually would resort to arbitration as the mode of trial in civil suits. This confusion was worse confounded after the grant of the Diwani in favour of the East India Company; things also did not improve to any appreciable extent even after the establishment of the plan of supervision

151. Storia Du Mogor, Vol. II, pp. 419-20. The Qazi referred to was of Agra during the time of the Mughal emperor Aurangzeb. The writer and the Qazi came to be very intimate with each other.

152. Siyar-ul-mutakherin, Vol. III, p. 27.

153. *Ibid*, p. 28. In one case the Qazi declined to inflict the punishment of death on the father who killed his little daughter with a hatchet, as he "regarded the destruction of a grown up man as a punishment more than adequate to the death of a child." Murshidabad Proceedings, 11 March, 1771, Vol. IV, p. 76.

154. Vide Clive's observations in 1767; J. Long, Selections from the Unpublished Records of Government, p. XXXI

and control in 1769. The reasons were not far to seek. The supervisors and the members of the Controlling Councils were absolutely lacking in experience and knowledge of administration. Reference may be made to some important civil cases that were actually decided by the supervisors and the Controlling Councils. One such case was of Sunkerdutt who was the Talukdar of Mankonda (Hugli).[155] The Chief and the Council called upon the Naib Diwan to give his opinion on the Arzee lodged by Sunkerdutt. The Naib Diwan confirmed the correctness[156] of the entire petition and accepting his opinion the Council gave the judgment in favour of Sunkerdutt even without requiring the other party to represent its case. The supervisor of Hugli was instructed to restore him to the possession of the Talookdari from which he was allegedly ousted.[157] Another case[158] decided by the Controlling Council was that of Damodar Singh and Cheytan Singh, Zemindars of Bishnupur (1771). The claimants were cousins.[159] The Council

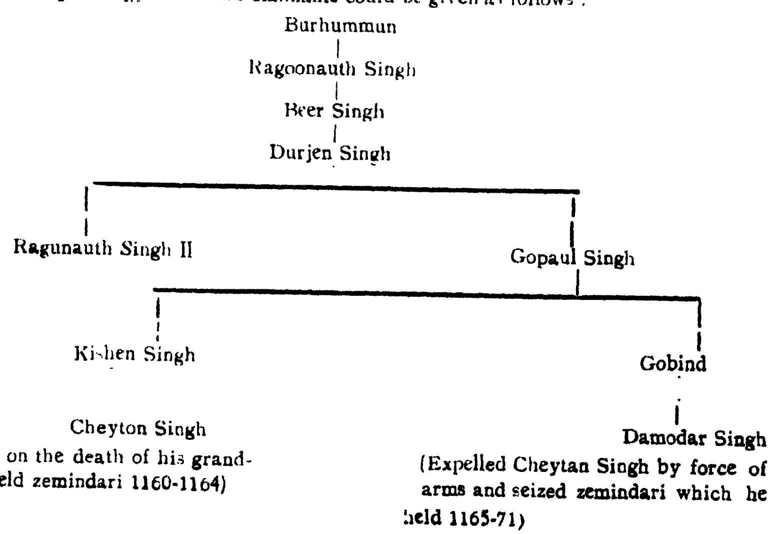
155. This case was entered in the Proceedings of the Controlling Council of Revenue at Murshidabad (25 Feb. 1771), Vol. IV, pp. 24-25.

156. The Diwan added "that Narhari Singh and Krishan Ram Sircar had been Talookdars respectively of Mankoondu and Baun Gachy before Sunkerdutt came into possession on their death. Narhari had no issue. His wife and Permissery, the grand-niece of Krishan Ram, therefore, disputed the claim of Sunkerdutt to the Talukdaris to which, as he said, he had been formally appointed by a sanad from Nabob Mir Kasim."

157. Letter to William Lushington, Supervisor, (25 Feb. 1771), Proceedings of the Murshidabad Council, (25 Feb. 1771), Vol IV, p. 25.

158. A translation of the Arzee of Damodar Singh was entered in the Proceedings of the Controlling Council of Revenue at Murshidabad (3 Jan. 1771), Vol. III, pp. 16-17 ; the Arzee of Cheytan Singh was entered in *Ibid*, (28 Feb. 1771), Vol. IV. pp 41-42.

159. The genealogy of the two claimants could be given as follows :



decided the case on the special consideration of the opinion of Graham who was a member of the Council and who advanced his arguments from his own personal knowledge. The estate was divided between the claimants equally. There was another case : The case of Captain David Mackenzee (1771). It was interesting for more than one reason. The complaints of the Zemindars of Coondy were very interesting.[160]

On receipt of the information about the arbitrary arrest and harassment of the Zemindars, Mr. Charles Purling, Supervisor of Rangpur, at once wrote to Mackenzee to release the Zemindars. But the Captain replied by saying that he was justified in his conduct according to the customs of the country which allowed that money-lenders could arrest their debtors and put them into confinement without any reference to the court of justice. On August 23, 1771, Purling sent another reminder the result of which was that another Zemindar[161] of the Pargana Boda was put into confinement on identical questions of realising debts. The Supervisor referred the matter to the Chief and Controlling Council at Murshidabad which took immediate action without giving him any opportunity of explaining his conduct when the Captain was relieved and ordered to proceed to Muradabad. And in consultation with the President and Council at Fort William, the Chief and Council at Murshidabad decided to have the Captain tried before a Court Martial. There was again an additional conflict between the Court Martial and the Council at Murshidabad in which the President and Council were inclined towards the latter. The Court Martial insisted on the observance of legal formalities to which the Controlling Council was not agreeable. Moreover, it was ordered by the Court Martial that J. Alexander, the Chief of the Council, should appear before the Court Martial for examination. Another point of conflict was that the Chief and Council wanted to dismiss the Captain even in the midst of the trial. They were expecting the dismissal through the Court Martial which, however, did not do it. The President and Council at Fort William openly censured and disapproved the conduct of the Court Martial.[162] Major Morgan, President of the Court Martial, took serious objection to this public condemnation of the court and drew the attention of the

160. Proceedings of the Controlling Council of Revenue at Murshidabad (23 Sept. 1771), Vol. VII, pp. 16-17.

161. He was named Shamchund Dass. The Zemindars in the other case were named Caushy Caunt Narain and Kishan Churd (of the Pargana Coondy). Shyam Chund Dass was alleged to have taken a loan of Rs. 1000/- at the rate of 10% interest.

162. Vide I.O. Bengal Letters Received, Public Department 14 January, 1772, Vol. 10, Para 1, pp. 164-165.

President and the Council in a written representation in reply whereto he was informed of his dismissal.[163] But Major Morgan was not the type of man to allow this matter to lie down quietly. On his representation of all the facts before the Court of Directors, he was restored to his post with all his pay and emoluments from the time of his dismissal. Meanwhile after the release of Mackenzee, the Chief and Council at Murshidabad invited six written complaints from the inhabitants of Rangpur on which the Captain was tried. This mode of trial was really very interesting. The Captain had no actual knowledge about the allegations against him ; a number of witnesses was examined, but there was no cross-examination or any thing of the sort. Every deponent was sworn and the entire content of the allegations was read out to him. The only thing that was to be said by the deponents was whether the allegations were right or wrong. There was no Vakeel on any side and no rule of evidence was applied. The Chief and Council were satisfied about the atrocities perpetrated by Mackenzee. A report was accordingly submitted to the President and Council at Fort William who referred[164] the matter to the Mayor's Court which reduced the rate of interest and ordered for the adjustment of the account.[165]

Thus the prolonged trial of Captain Mackenzee clearly exhibited the arbitrary, irregular and imperfect character of the judicial proceedings of the period. There was no dependable system and the public servants concerned had no professional training. The Nabob's Government, was no doubt responsible for the administration of justice, but it lacked the means whereby to discharge this responsibility ; the Company's Government, on the other hand, had the means but felt no responsibility to do it. Naturally in such a state of anarchy in the country no man without sufficient means could think of any security of his life, person or property. The Parliamentary Committee of Secrecy thus rightly observed in 1773 "that in general though forms of judicature were established and preserved, the despotic principles of the Government rendered them the instruments of power rather than of justice not only unavailing to protect the people, but often the means of the most grievous oppressions under the cloak of the

163. President and Council to the Court of Directors, 31 March, 1772, I.O. Bengal Letters Received, Vol. 10, paras 22, p. 325. Paras 14-21 contain their reflections on the public conduct of the Court Martial.

164. The report was submitted to the President and Council on June 22, 1772. Vide Press List of Ancient Documents etc. Series II, Vol. II, p. 384.

165. *Ibid*, Series II, Vol. II, pp. 441-42. The proceedings of the case were closed in December, 1772.

judicial character".[166] Illegalities and atrocities were rampant. Istances could be easily multiplied as they occurred in the different parts of the country, such as, Rajshahi[167] Purnea,[168] Murshidabad,[169] Jessore,[170] Dinajpur[171] and Rangpur.[172] Taking advantage of the confusion and uncertainty in the country, the company's troops also indulged in acts of pillage and plunder.[173] Very rarely could be seen some supervisors[174] who inspired

166. Seventh Report of the Committee of Secrecy (1773), p. 325 ; vide also letter of Ducarell, Supervisor of Purnea, to the Chief and Controlling Council of Revenue at Murshidabad, 3 December 1770 (Murshidabad Proceedings, Vol. II. pp. 66-67).

167. In this case one Murad was confined and tortured by a money-lender, named Jalley, for a loan of only Rs. 25/-. The wife of Murad also was molested. For the translation of the complaint in this case, see Proceedings of the Controlling Council at Murshidabad, 6 Feb. 1772, Vol. IX, p. 153. Cf. C. W. B. Rous to the Resident at Murshidabad, 21 Jan. 1772. Letter Copy Book of the Supervisor of Rajshahi at Nator, pp. 3-4.

168. Sometimes cases involving murder were compounded for four or five rupees. Vide Report of G. G. Ducarell, Supervisor of Purnea, 3 December, 1770 entered in the Proceedings of the Controlling Council of Revenue at Murshidabad, 13 December, 1770. Vol. II. pp. 66-67. In two cases of theft of Rs. 400/- and a horse respectively, each of the accused was adjudged by the Faujdari Adalat at Purnea to have one hand and one foot cut off. (Vide proceedings of the Controlling Council at Murshidabad, 25 Feb., 1771, Vol. IV, p. 20).

169. One Kishen Chand Muharrir died as the result of severe flogging inflicted on him by Mir Kashim for a simple fault of not having deposited a sum of Rs 7/- only by the sunset. (Jacob Rider to Resident at Murshidabad, 14 September, 1770 . Cf. The Letter Copy Book of the Resident at the Durbar at Murshidabad, Vol. II, pp. 1-2)

170. The Supervisor of Jessore gave a very dismal picture of the slaughters and plunders by the banditti. Vide from William Rooke, Supervisor of Jessore, to the Chief and Council at Murshidabad, 28 January, 1771. (Murshidabad Proceedings, 4 February, 1771, Vol. III, p. 110).

171. Reports of open defiance would come from many places including Nadia, Dinajpur and Jessore For the open disorder at Dinajpur, vide Murshidabad Proceedings, 28 March, 1771, Vol. VII, p. 112. Sometimes the security of the Company's own property was endangered by the ravages of native Zemindars who would often secretly harbour dacoits and robbers for their atrocious actions. (Vide Press List of Ancient Document, Series II, Vol. II, p. 20 ; also the Murshidabad Proceedings, 17 December, 1771, Vol. VIII, p. 4.)

172. In course of his tour in Rangpur, James Lawrell, who was a member of the Controlling Council at Murshidabad detected many Sepoys under Captain Mackenzee, who were involved in exaction and atrocities on the innocent villagers. (Vide letter from J. Lawrell to Charles Purling, 12 July, 1771, Murshidabad Proceedings, 8 August, 1771. Vol. VI, p. 68.)

173. The Supervisor of Jessore reported in August 1770 that the Sepoys sent by him to suppress the band of robbers in one of the Parganas of his District themselves began to plunder the villagers. (Vide Press List of Ancient Documents, Series II, Vol. II, p. 25.)

174. John Grose, the Supervisor of Rangpur. expressed his limitations in very strong terms as follows :

"Am I quietly to stand by and see them (Amils and Zemindars) commit the vilest acts of oppression without being able to render the aggrieved redress—a hard cause in deed on the poor ryots who must not look to me with hopes of having their cause enquired into till such time as the Amils, Zemindars and other creatures of (native) Government have enriched themselves at

by a strong sense of justice showed signs of resistance to oppressions and atrocities and tried to secure relief[175] to the victims by their personal inter position and enquiry.

their expense, nay even their ruin, when it may be too late and not in my power to grant them redress?" (Vide Rangpur District Records, Vol. I, p. 8, From Crose to Becher, 14 July, 1770).

175. For the regulations proposed by C. W. B. Rous, Supervisor of Rajshahi, for the Pergana Qazis within his jurisdiction, vide JBRS, Vol. XXXVII, Parts 1-2, pp. 272-74. These regulations were intended to check the atrocities of the officials and improve the administration of justice.

CHAPTER XI

The history of village Panchayats with special reference to the administration of Hindu Law during the Muslim period and adherence to Hindu Law by the Non-Muslim rulers.

1. Introduction

The village Panchayats, as integral parts of the village republic, played a very important part in ancient and medieval India and they are still playing a very important role in modern India also. In their judicial capacity they decided local disputes. The importance of the village Panchayats was thus rightly emphasised by R. R. Diwakar, Governor of Bihar: "I look upon the Panchayat as the basis of all democratic governments. We have no doubt a Parliament in Delhi and an Assembly at Patna, but they are only the superstructures. They can be strong and popular only if the Panchayats become efficient and strong. We see a man's eyes and head first but he stands on feet and legs. Very little could be done from the top if the villagers remained idle. They should realise that the whole village was a unit and the happiness of one depended upon the happiness of all. Man being a social being, he had to share the joys and sorrows of society......Even small countries like Holland and Denmark were richer in many respects than India. They had no gold or silver mines but the people lived by co-operation and so were able to produce more and share the riches better......Panchayats and co-operatives were the twin wheels on which rode the goddess of plenty and prosperity." The decision of the Panchayats was binding on the parties.[1] It has been rightly said by Dr. Mukherjee[2]: "Neither Mauryan bureacracy, nor Mahomedan invaders, neither the centralised administration of Akbar or Aurangzeb nor the British Ryotwari or permanent settlement have obliterated the traditional rights of the village communities as described in the Arthaśāstras. The functioning[3] of these Panchayats was hardly interfered with even though sometimes they might be giving decisions

1. See Report of the Select Committee of the House of Commons, 1832, Vol. III, and the note of Sir Charles Metcalfe.

2. Democracy in the East, p. 20.

3. Cf. the Customs of the Nairs in Malabar: the Customary Law of the Panjab by Wilson, p. 57.

based on local customs not always strictly in keeping with the law of the country. No attempt was ever made to affect these customary laws to conform to the strict positive law of the state. Sir Henry Maine also rightly observes that the laws of the Panchayats were their own and they were left quite unaffected by the legislators or the administrators. The people had fewer disputes and had them settled amicably by themselves or by the village Panchayats whose decisions were as good and binding as the decisions of the law courts. The decisions were generally non-appellable and were invariably obeyed on pain of excommunication from the society.

The Panchayat system of deciding disputes among the villagers continued long after the breaking up of the medieval empires. Even to-day we find that in some states by the Village Panchayat Acts many wide and real powers have been recognised to be exercisable by the village Panchayats. During the Mahomedan period when the rulers were Non-Hindus, the Hindus depended mainly on these Panchayats without seeking any redress from the alien rulers themselves, particularly in civil disputes. The Hindus really fought shy to approach the foreign rulers for adjudicating their own personal disputes which were to be decided with special reference to their personal laws and customs. The rulers welcomed this idea and they refused to interfere with the administration of the local Panchayats or assemblies which to a great extent relieved the rulers of their judicial responsibility. This was also a necessity for them so that they might be otherwise care-free to proceed with the consolidation of their rule in this country. "Most quarrels", says Dr. Jolly,[4] "did not come within the cognizance of the courts at all but were decided by private arbitrations. This has been pointed out by competent English observers of Indian life and the same result may be gathered from impartial study of the Indian law books, ancient and modern.[5] Orientals do not like public tribunals to meddle with their private affairs and there were excellent reasons for this natural aversion in India as the native courts[6]

4. Outlines of an History of Hindu Law (Tagore Law ectures), pp. 32-33.

Cf. Judicial Administration of East India Company in Bengal by Dr. B.B. Misra, JBRS, Vol. XXXVII, Parts 1-2, pp. 230-31.

5. See the texts collected in the Colebrooke's Essay on the Hindu Courts of Justice.

6. In theory both Hindu law and Mahomedan law insisted on a very high degree of honesty, integrity and learning on the part of the judges and the Qazis. But in actual practice instances of corrupt judges and Qazis might be come across. But they were in the shape of exceptions rather than the rules. Thus it has been said of Abdul Wahab Borah, the first Chief Qazi of Aurangzeb's reign, that he was so corrupt that during the 16 years of his office he amassed a fortune of 33 lakhs of rupees in cash besides much jewellery and other valuable

and not unfrequently the Rajas themselves were excessively corruptible. As therefore the public courts had far less legal business to transact than the Panchayats or other private tribunals, established *ad hoc*, it was but natural that customary law should have played a more prominent part in those days than written law." It is thus perfectly true that very few cases between Hindu litigants would come to the courts on account of the functioning of the village Panchayats.

It has already been seen[7] that even from the early times of the Smritis, there were many tribunals in ancient India in the shape of assemblies of kinsmen, artisans, corporations and parishads which were more or less analogous to the village Panchayats in their jurisdiction and function. These different tribunals according to the Smritis decided disputes among themselves. But there was one important point of difference between these tribunals and the Panchayats of the subsequent periods. It appears that the conception of Panchayats originated with that of the tribunals referred to above. During the Smriti period they were not exclusively private, as appeals lay from their decisions to the king in the last resort. These tribunals were thus linked up with the king who could revise their decisions on appeal. It goes without saying that unless set aside in appeal, by the higher courts including that of the king, the decisions of these tribunals were necessarily binding. But there were fundamental changes with the advent of the Muslim rulers. The tie which so long bound the inferior tribunals with the king was absent; and these courts were also automatically severed from the Mahomedan kings thus being relegated to the position of village Panchayats which were nonetheless recognised by the Muslim rulers as well who did not, however, associate themselves with them as intimately and as coherently as the Hindu kings. Thus on account of the apathy and the aversion from both the sides there was a sort of *ipso facto* separation of the relationship between them. The net result of this development was that the Panchayats as the successors of the Kulas, Śreṇis etc. of the Smṛiti age retained their potency for deciding disputes particularly among the Hindus. In course of time, however, the scope of the Panchayats was widened to include even the Non-Hindus within their jurisdiction. The present day Panchayats do not imply an exclusively Hindu institution. Though originally they might have their genesis in

things. But his son and successor Shaik-ul-Islam was of an exactly opposite character. He did not touch even a penny of his father's ill-gotton riches but gave away his share of them in charity. (See Sir J. N. Sarkar's Mughal Administration, p. 112.)

7. See ante, Chapter VII.

the Hindu institutions, still from the beginning or rather at an early stage of the Muslim rule they began to assume more and more catholic and cosmopolitan character. The reasons were more political than sociological. The Panchayats became more and more important to usurp in course of time many functions of the regular courts. "The Indian villager in the Mughal empire," says Sir Jadu Nath,[8] "was denied the greatest pleasure of his life in our own time, viz., facility for civil litigation with Government courts of first instance close at his doors and abundance of courts of appeal rising up to the highest court at the capital ; men had, therefore, to settle their differences locally by appeal to the caste-courts or Panchayats, the arbitration of an impartial umpire (salis) or by resort to force." It is undoubtedly true to say that the entire Muslim administration of justice in general was very simple, informal and without any hierarchy of different courts of appeal of different degrees. The Muslim law of procedure was far from elaborate; there was also no regular and full-fledged legal profession. Nor was there any elaborate provision for the law of evidence. Hence justice could be administered speedily and effectively. The observations of Bernier are very significant in this connection.[9]

2. The earliest Hindu prototypes of village tribunals

The rudiments of the various kinds of popular assemblies can be traced even in the Rigvedic society. From the very earliest times, the constitution of the Hindu society was organised on the basis of the autonomous villages as its units. The different institutions based on these villages were not only recognised but also greatly emphasised during the subsequent Smriti epoch. The population consisted of tribes known as "janas" comprised in janapada which was a collection of some grāmas or villages. These grāmas in their turn were made up of gosṭhis. These gosṭhis again were the collection of gotras which in their turn were based on family. The grāmaṇi was the head of the village occupying a respectable position between the ruler and the people. In the very Vedic period we come across some terms, such as, Sabhā, Samiti and Parisad which were conceived more or less on the units of villages. Though there is a lot of

8. Mughal Administration, pp. 19-20.

9. P. 236. There was no regular legal profession during the Hindu period; but some traces of it are to be found during the Mahomedan period particularly in its later part. The full-fledged legal profession in India was, however, reserved for the British period.

difference in the different authorities[10] regarding their functions and constitutions, it was generally believed that the Sabhā was a sort of village council consisting of the assemblage of learned and respectable persons who contributed to the national judicature.

In the Dharmasūtras and the Dharmaśāstras we come across certain other terms such as, Gaṇa, Kula, Śreṇi Pūga, Vrata etc. as discharging some judicial functions. The terms Gaṇa and Vrata were of course to be found even in the Vedas.[11] The existence of so many different kinds of judicial tribunals indicates that perhaps the country hardly had any central judicial structure. Sir Henry Maine makes a general observation that "the king and the popular assembly are found side by side in a great number of human societies when they must show themselves on the threshold of civilisation." According to Spencer again, "the gathering of armed men which was at once the Council of War and the political assembly is at the same time the judicial body." Speaking of the Islamic countries, Sir Abdur Rahim says that the responsibility of administration rests with the Iman. but as a matter of convenience, he may delegate his powers to different persons. He was the representative of the people from whom he derived his rights and privileges." The observations of Lee[12] are very significant in connection with the state of administration of justice in ancient India: "The Royal system did not harmonise with the spirit of the day. The villagers had a judicial system of their own[13] at once familiar to and respected by them ; the various trades and guilds had a similar system. The presiding officer of the popular courts or the guild-courts held office either by election or inheritance according to local custom. With him were

10. Accordiug to Sayanācaryya, the Vedic commentator, the Sabhā was an assembly of learned men, whereas the Samiti was the assembly of warriors (Dharmakoṣa, I, 22). Macdonell and Keith believe that "it is reasonable to assume that the business of the Samiti was general deliberation on policy of all kinds, legislation and also judicial work " and that the Sabhā was a sort of village council of Brahmins and rich people which used to meet frequently for the purpose of administration of justice. Hence Sabhasad was a kind of assessor who was connected with the judicial work.

Though the Samiti did not survive the Vedic period, the Sabha came to be recognised as the principal judicial institution according to the Dharmas'astras.

11. History of the Saracens, pp. 62, 196.

12. Historical Jurisprudence, p. 141.

13. Administration of justice was largely in the hands of the village assemblies or other popular or communal bodies established expressly or impliedly by the king. The authors of the Vedic Index also hold that "there is very little evidence in the early Vedic literature as to the administration of justice." According to Pollock and Maitland also, (History of English law, pp. 37-40) in Anglo-Saxon England, "Various assemblies were acting as courts."

associated three or five men. In these apparaently private courts were settled the affairs of the every day life. In cases of grave crimes or when the condemned party refused to obey the judgment of the local court, the court of the king was concerned with litigation." In course of time, however, we find that "King's peace[14] is recognised as infringed by crime." Medhātithi distinguishes torts and crimes thus :

"Ṛiṇādiṣu itaretare saṃdadhāte na tatra rānjño hastakṣepaḥ......... Sāhasakārītu rājñā avaśyaṃ nigrihītavyaḥ itareṇa saṃdhīyamānopi." (Dharmakoṣa I. P. (260). The Daṇḍvivaka[15] also elucidates the point more fully.

The different kinds of popular courts have been thus enumerated by Yājñavalkya :[16]

Nṛipeṇādhikritāḥ[17] pūgāḥ śreṇayotha kulānica,
Pūrvaṃ pūrvaṃ guru jñeyam vyavahāravidhau nṛiṇām.

A similar verse is found in Nārada where the word Gaṇa has been substituted for Pūga. Brihaspati and Pitāmaha also speak of courts beginning with Kula etc. The hierarchy of the different courts has been explained by Pitāmaha by the passage :

"Grāme driṣṭaḥ pure yāyāt pure dṛiṣṭastu rājani,
Rājñā driṣṭaḥ kudriṣṭovā nāsti tasya punarbhavaḥ."

Pitāmaha further makes some special provision when he specifies the law to be followed by these tribunals:

"Deśapattanagoṣṭheṣu puragrāmeṣu vāsinām
Yeṣām svasamayaiḥ dharmaśāstrastanyeṣu taiḥ saha."

Thus according to Pitāmaha, a suit should first of all be tried in the village (or village Panchayat); then it should be tried in the town (in appeal) and last of all the king should give the final decision as the highest appellate tribunal. There is no re-trial of any case once it has been decided by the king......rightly or wrongly ; further he remarks that between parties of the same country, town, societies, cities or villages, the adjudication should be made by following their own conventions and usages ; but when

14. Jayaswal says in his Hindu Polity that "the S'atapatha Brāhmaṇa starts the theory that the king should not merely protect the law but himself administer it in person or by his officers. The old theory had been that the law of the community was administered by the community."

15. Cf. Bardhamāna, pp. 259-260.

16. II, 30.

17. Different interpretations have been given for the expression "Nripeṇādhikritāḥ." But the most plausible explanation seems to be that which makes it an independent court presided over by the king as contrasted with the other courts which are popular in origin and more or less informal in function.

the dispute is between these persons and strangers, the law of the Dharmaśāstra should be applied.

The Smriti of Manu also enjoins on the king that he should respect the laws of the Jāti, Śreṇi and Kula.[18] Though he does not expressly mention that these bodies have got judicial powers, still it appears to be implied that such power of adjudication also was recognised in their behalf. The Dharmas or rules of these bodies must mean the rules and principles as understood and acted upon by them.[19] The sages and the commentators did not stop simply after enumerating the different popular or local courts and their relative superiority or inferiority, but also they discussed many other aspects of the questions with so much care and insight that it cannot be believed even for a moment that these courts were not actually in existence and great use by the people. Thus one commentator Mitramiśra, the author of Vyavahāra Prakāśa, raises the question also as to where from the so-called courts of the Kula, Śreṇi etc. derived their authority, as they were not the royal courts. The Vyavahārodyota suggests that these popular courts also were established by the king. In this connection the expression "Nripeṇādhikrita" in the beginning of the text of Yājñavalkya, referred to above, has been interpretted as "appointed by the king." But this explanation is against that of Vijñāneśvara who implies by this expression independent courts presided over by kings. The explanation of Vijñāneśvara is more plausible, as it has been already suggested above. The king's authority might not be actually necessary for the competence of these courts, because they were already found in existence among the people to their great benefit and advantage. This is perhaps implied by the injunction of Manu, referred to above, according to which the king is to respect the law of the Kula, Śreṇi etc. If these courts were in reality to be established by the king, no further injunction would have become necessary to say that the king must honour the courts of his own creation. The Subodhini commenting on Yājñavalkya's text suggests another reason for the superiority of the king's courts over these Panchayati courts :

Nripohi balavān vyavahāraṃkārayituṃ samarthaḥ iti "Vyavahāravidhau sa eva jyāyān itarepi sāmarthyāpekṣyayā durbatābaliāṃsaśca bhavanti."

The efficacy of these local courts will have to be more readily

18. Manu, VIII, 41.

19. Sir W. Holdsworth also similarly speaks of the local courts of medieval England. (History of English Law, I, P. 9.)

admitted if we remember the manifold qualities that are insisted on by Kātyāyana for the kāryacintakas for the Śreṇi, Gaṇa etc :

> "Śucayo vedadharmajñā dakṣā dāntāḥ kulodbhavāḥ
> Sarvakāryapravīnāścalubdhā vriddhāmahattarāḥ."

Kātyāyana of course mentions once that those who try to decide disputes without being authorised for this purpose must be punished by the king for their arrogance :

> "Anirdiṣṭāśca ye kuryuḥ vyavahāraviniścayaṃ
> Rājavrittipravrittāste teṣām daṇḍam prakalpayet."

Professor Jolly made a general observation by saying that Kula, Śreṇi, Gaṇa etc. were only private arbitrations. But as it has already been noticed, they were more than mere private arbitrations, in as much as, among other considerations, there could be appeal from these courts upto the highest tribunal of the king. In arbitrations, the parties are responsible for the choice and appointment of the arbitrators, but this was not the case with the courts of Kula, Śreṇi etc. These courts were already in existence and they were only to be approached by the parties for the adjudication of their disputes. This aspect of the question has been very explicitly discussed by the Smriticandrikā in explaning the famous text of Brihaspati while classifying the courts as Pratiṣṭhita, Apratiṣṭhita and so on.

Viśvarūpa made another very important observation by saying that a party cannot approach the king direct except through the courts of Kula, Śreṇi etc. But this seems to be too general a statement not supported by any other material evidence. The kings had both original and appellate jurisdictions.

In providing for the type of evidence to be insisted on in trials by the courts of Kula, Śreṇi etc. it is stated by Kātyāyana that oral evidence or evidence through ordeals should not be accepted ; the only type of evidence that will be acceptable is documentary evidence. The reasons have been explaimed by the Vyavahāra Prakāśa.

There is a fundamental distinction between the courts contemplated by Kauṭilya in his Arthaśāstra and those conceived by Manu in his Dharmaśāstra.[20] The later Dharmaśāstras of Nārada, Yājñavalkya,

20. According to the scheme of the Arthas'āstra of Kauṭilya, for the administration of justice, king's courts are to be appointed in the Saṃgrahaṇa which means a group of ten villages, the Droṇamukha which means a collection of 400 villages and the Sthānīya which means the assemblage of 800 villages and also at the meeting places of the districts. The courts were to consist of those Dharmasthas, i.e., men versed in the sacred law and three Amātyas, i.e., the Ministers of the king. Manu, on the other hand, continues the Sabhā

Brihaspati and Kātyāyana of course followed Manu rather than Kauṭilya. The Gautama Dharmasūtra again provides that cultivators, traders, herdsmen, money-lenders and artisans have authority to lay down rules for their own groups... "Karṣakaḥ, Vaṇik, Paśupālaḥ, kusīdaḥ, kāravaḥ sve sve varge ;" and also that the king shall give his decision on hearing from persons or making enquiries through persons who are competent to do so : "Tebhyo yathādhikāram arthān pratyavahṛtya dharmavyavasthā."

According to the Cambridge History also[21] all disputes were usually disposed of locally "by reference to Panchayats permanent or constituted *ad hoc* or by officials of different grades and there was also provision for appeal to the king at the last resort.[22]

The Smriticandrikā calls certain courts superior—Śresṭh nirṇayasthāna and others as inferior or Jaghanyanirṇayasthāna. The latter type of courts has again been enumerated by Bhṛigu.[23] According to the Smriticandrikā and the Vyavahārodyota the first five courts are meant for the five groups of people enumerated in the above text of Bhṛigu whereas the other courts are intended to have general jurisdiction.

Brihaspati also refers to the above courts of Āraṇyakas, Sainikas and traders along with the courts of Kula, Śreṇi and Gaṇa etc. These courts according to him could not deal with sāhasa.[24]

system which was found to have been in existence from the Rigvedic times. According to the provisions of the Manu Smriti, the king is to appoint a Headman for each village and Head man for the groups of villages. He further provides that "the Governor or the Headman of the village shall try all cases of offences occurring therein Cases which he is not able to decide he shall refer to the Governor or Headman of ten villages. In cases of doubt or incompetency, the Head of the ten villages shall refer to the Head of twenty villages and the latter to the Head of 100 villages, and he too under similar circumstances to the Head of 1000 villages." This seems to be the scheme primarily for the administration of criminal justice.

Brihaspati offers another classification of courts as pratiṣṭhita, mudrita and s'āsita or s'āstrita. The first of these courts was fixed in a certain place; the second could sit at any place according to the circumstances. According to the Smriticandrikā the second type of courts enumerated above refers to the courts meant for the āraṇyakas, sārthikas and sainikas ; Mudrita was the court which was presided over by a judge appointed by the king in person.

21. I. p. 485.

22. Dr. R.C. Majumdar, Corporate Life in Ancient India, pp. 95-96.

23. Dharmakoṣa I, p. 55.

24. A verse quoted in the Dharmakoṣa (II, p. 874), however, indicates that pāpakarmas or sinful acts could be punished by these courts with Vāgdaṇḍa, Dhigdaṇḍa and Parityāga. The word Parityāga has been differently explained by the different commentators. Thus Aparārka means by Parityāga excommunication or asaṃvyavahāryatā ; but the Smriticandrikā means by this word branding (anka-karaṇa) or banishment (pravāsana).

A text which is attributed to Śankhalikhita indicates that the leaders or the elders had jurisdiction in Gaṇa, Samaya, Śreṇi and Pūga, but that offences against the king (Rājadroha) or treason could not be taken eognizance of by them. Nārada also refers to the courts Kula, Śreṇi and Gaṇa, but Kātyāyana gives a more exhaustive enumeration of courts including Pūga, Vrata, Nigama and other special groups—communal or occupational.

The view of Dr. P. N. Sen[25] that these inferior courts were a sort of delegated authority within their own sphere has been rightly criticised. No delegation was to be presumed or essential ; in as much as these popular courts had been in existence even from before the organisation of the royal courts. They grew out gradually according to the needs and circumstances of the different peoples to be comprised by them. Hence these institutions are quite congenial to the soil and atmosphere of the country. Dr. Mukherjee[26] rightly observes that "the principle underlying these lower and local courts is that in cases of dispute the best men of the locality concerned can alone be the proper judges."

The text "Rājñā dristaḥ kudriṣṭovā nāsti tasya punarnayaḥ" attributed to Pitāmaha has been understood subject to two limitations : one of them is implied by a text of Nārada. The other limitation is supposed to have followed from the text of the Vyavahāramātrikā, that is, what the king himself has done without conforming to the provision of the śāstras, or what another different king has done through ignorance—such cases should be tried *de novo* in compliance with the rules of the śāstras.[27] Mr. Jayaswal[28] summarises the constitution and function of the different popular courts in ancient India by saying that "The Kula-court was presided over by Kulikas[29] or the aristocrats.... There were industrial organisation in a Gaṇa as in a monarchy. These guilds (pūgas) had some judicial powers. But their decisions were appellable to the Kula and Gaṇa courts. When the Gaṇas were conquered by and became subject to monarchs, as in the days of the later law books (Nārada, Brihaspati and

25. Hindu Jurisprudence, (Tagore Law Lectures), p. 363.

26. Local Government in Ancient India, p. 135.

27. Vis'varūpa commenting on Yājñavalkya says that every litigant has the right to go to the king ultimately for the adjudication of his cause.

28. Hindu Polity, pp. 105-6.

29. "Rāṭṭapala after whom a text is named in the Pali was a Kula putta and a son of an Agga-kulika." See also Vīramitrodaya, p. 11.

Kātyāyana) decision of Gaṇa was made subject to the appellate jurisdiction of the monarch[30] or the royal Chief Justice."

This is also corroborated by Bṛihaspati, as quoted in the Vīramitrodaya, p. 41. Kane[31] gives encyclopaedic references of the different words, such as, Śreṇi, Pūga etc., as they have been used in the Ṛigveda, the Brāhmaṇas, Pāṇini, Kauṭilya and the different authors of the Dharmasūtras and the Dharmaśāstras.[32] He also enumerates different inscriptions in which the various kinds of corporations have been mentioned and concludes by saying that "these examples show that about the first centuries of the Christian era such castes, as wood-workers, oilmen, betel-sellers and weavers that are at present very low in the hierarchy of castes had very efficient caste-guilds, so famous for their organisation, integrity and stability that people deposited with them thousands for permanent service with objects of charity."

Regarding the Pūga, Śreni and Kula, Mr. Colebrooke rightly says that they are "different degrees of Panchayeti which, as is apparent, is not in in the nature either of a jury of a rustic tribunal, but merely a system of arbitration subordinate to regularly constituted tribunals or courts of justice." According to him these Panchayetis came to be very seriously affected[33] after the passing of a Regulation in 1781 according to which the decisions of these tribunals could be set aside when gross corruption and partiality could be proved against these Panchayatdars. The Regulation was passed no doubt with a good intention to serve as checks, but the usual practice that was indulged in by the litigants was to calumniate the panchayatdars. The condition was not, however, to be found in the original popular courts, as they were conceived by the ancient Hindu Law Codes, according to which the aggreived parties could appeal to the superior courts as a matter of right. In any case, the Panchayat system never died out in India. And with the indepdndence of India a new impetus has been given to it, so much so, that a provision to this effect was made in the very constitution of India itself as one of the important Directives of state policy.

30. Even the kings themselves were liable to be fined ; and the fines imposed on the kings would be much heavier than those imposed on the ordinary people.

31. History of Dharmas'astra, Vol. II, pp. 67-69.

32. According to Kātyāyana, Naigama is an association of citizens of the same city, Vrāta is a company of soldiers carrying various arms, Pūga is an association of traders and the like. Gaṇa is a group of Brāhamaṇas, Saṃgha is a body of Buddhas or Jainas, and the bands of Caṇḍālas and S'vapākas are called Gulma.

33 Dr. Altekar suggests different reasons ; Village Communities in Western India, pp. 52-53.

3. The function of the village Panchayats during the Muslim rule

Having their precursors in the different popular tribunals of the ancient Hindu society, the village Panchayats played a much more important role during the Muslim rule in India. As it has been seen above, there were so many different kinds of popular courts in ancient India. There can not be any room for doubt that they were not actually functioning in the ancient society. The ancient legal literature of the Hindus abounds in descriptions and illustrations of the different kinds of popular courts constitutionally inter-linked with each other in the sense that appeals could lie to the king as the highest tribunal in the last resort. These courts existed right up to the end of the Hindu rule. But with the consolidation of the Muslim rule in India, the character of these courts underwent a fundamental change. Their link with the king at the last resort was not to be found in the Muslim rule. Hence they became only popular Panchayats unconnected with the Muslim royal courts. But in a sense so far as the Hindus and their personal laws were concerned, they became more important and they began to serve the legal purposes of the Hindus almost exclusively, so far as the civil side at least was concerned. The Hindus would fight shy to approach the Muslim rulers or the royal courts presided over and assisted by Muslim officers ; the conditions for the regular administration of justice also were not prefectly favourable and above all the rulers themselves also were very much relieved when they saw that the administration of civil justice was being carried on by the popular courts of the Hindus themselves. Thus the exclusive jurisdiction of the Panchayats over the Hindus became much more prominent and was serving a much more useful purpose. The Panchayats thus played a very conspicuous part during the Muslim rule. As it has already been seen, the Panchayats became more and more catholic in character and wider in jurisdiction, so that they lost their original Hindu colouring and became more or less territorial in function and constitution.

There were many factors that contributed to the survival and even strengthening of the Panchayat system during the Muslim rule. The royal courts and the kings could be hardly accessible by the ordinary litigants ; the court-officers and employees were in the habit of harassing those that would go to them for justice ; there was also corruption rampant everywhere. These draw-backs were no doubt remedied to a great extent by the Mughal emperors beginning with Akbar ; but on the whole the village Panchayats proved more or less satisfactory and the least expensive. Moreover there were not so many regular courts which could be within the easy

reach of the people. To go to the kings and emperors at the capital was again not always very easy and convenient. Hence Sir Jadu Nath Sarkar was quite justified in observing that "the Indian villagers in the Mughal empire.........had to settle their differences locally by appeal to the caste courts or the Panchayats or the arbitration of an impartial umpire (salis)." The decisions of the Panchayats during the Muslim rule were generally speaking more dependable and based on greater regularity than the arbitrary judgments of the rulers themselves. The Panchayats were more or less bound by precedents and traditions, but there was no such restriction for the rulers themselves.

The South generally was not very deeply influenced by the Muslim institutions—administrative or judicial—like Northern India. There the Hindu conceptions of village courts and Sabhā were less interfered with by the Muslim rule. Thus according to the Uttiramerur inscriptions[34] it is found that the entire administration of the village was entrusted with a Mahāsabhā which consisted of several smaller councils or committees for the purpose of administrative and judicial works. The people were in charge of the entire administration, subject only to the control of the Divisional Government and the Government at the Head quarters. There was very little interference by the kings though from the village courts appeals could ultimately lie before the king. Thus subject to rights of appeal by the aggrieved parties, the village courts could try both civil and criminal cases. According to Dr. Meenākṣī there were two kinds of courts in South India—Dharmāsana and Adhikaraṇa resembling the Dharmasthīya and the Kaṇṭaka Śodhana of Kauṭilya. Mr. Sastriar thinks that the village assembly of later times was "the product of the interaction of the Southern and Northern or Tamil and Sanskrit influences." The primitive indigenous local organisations of the Tamil country were represented by "Ur." The existence of the "Ur" beside the Sabhā indicates that there was a sort of compromise between the original Tamil elements with the superimposed Brahminic elements. During the Chola regime[35] also villages were regarded as the administrative units. The local corporations or assemblies were empowered to decide local disputes. According to the inscriptions, the village assemblies acted not only as courts for administration of justice both civil and criminal but they were also entrusted with the

34. These inscriptions give the picture of the society as it existed in the tenth or the 11th centuries. See also Dr. K. Aiyangar's Hindu Administrative Institutions in South India; The Cholas and the Studies in Chola History by Mr. N. Sastriar.

35. Nadu, Kottam or Kurram were constituted by villages. A large sized village was known as Thaniyar.

maintenance of general law and order and the moral standarad of the people. Though these bodies were under the supervision and control by the king, still there was usually the least interference.

Again from an imaginary trial described in a Tamil book, Mr. Sastriar says that even in the 12th century A.D. there was a well-defined procedure that was followed in trials and also that village courts used to administer criminal justice having their decisions subject to the revision by the royal courts or officers. There was hardly an appeal that would go up to the king, though theoretically there was provision fot it. The people would be ordinarily satisfied by the decisions of the village courts.[36] According to Mr. Mahalingam under the Vijaynagar kings, there was no regular hierarchy of king's courts. But civil and criminal disputes were decided by castemen or village elders and popular courts in the form of caste-courts, guilds or religious heads.

Though Maharastra was conquered by the Muslims from the Yadava kings of Devagiri, still there was very little Muslim interference in the judicial administration of the country which was primarily carried on by the village Panchayats. There was hardly any regular court which might be regarded as the royal courts. The procedure was quite simple and primitive. During Shivaj's rule, justice was mostly entrusted to the village Panchayats—which relieved the Government to a very great extent of its police and judicial function. Though there is some amount of exaggeration in the observations of Elphinstone regarding the judicial administration of the Marhatta rule, still they were essentially correct: "There was no regular administration of justice, no certain means of filing a suit and no fixed rule of proceeding after it had been filed. It rested with the officer of Government appointed to receive a complaint or to neglect it altogether. The other occupations of these officers rendered it difficult for them to attend to judicial affairs. The Peshwa must have been nearly inaccessible to all men and entirely so to the poor." The Patels, the Mamlatdars and the Kamavisdars had comprehensive duties to perform. Regarding the judicial work, their duty was mainly to see cases compromised either by the parties themselves or decided by the Panchayats.[37]

36. These village courts owed their existence ultimately to the moral support of the public approval The public were convinced of their efficacy and could see that the things could be managed very efficiently and impartially by the leaders among the villagers whose honesty and integrity could not be ever subject to suspicion or betrayal.

37. The Hindu Judicial System, S. Varadachariar, Judge, Federal Court, India, p. 251,254.

From the account given regarding the administration of justice in Mysore[38] just before it came under the British control, it appears that there was no separate department for administering justice except the Qazis who were concerned more with the ecclesiastical matters among the Muslims. The Hindus were generally governed by their customs and the provisions of the Śāstras. When any accused person was apprehended and when a public trial of that accused persons was deemed necessary, the Subadar or the Amil would order a Panchayat to be assembled. This Panchayat would consist of all the respectable inhabitants who were not in any way connected with the parties; these inhabitants would sit as assessors. Similarly in civil cases also when the disputes would involve amounts greater than five pagodas, they would be determined and decided by a Panchayat. According to a repoŕt, referred to by Rice, there was one very significant rule of evidence. In Mysore it was a rule to view with suspicion the testimony of all witnesses unless it was otherwise corroborated. This undoubtedly made the task of the Panchayats much more onerous, as they had necessarily to take many factors into consideration for arriving at the truth after setting every item of evidence adduced : "It is a fixed rule of evidence in Mysore to suspect as false the testimony of every witness until its truth is otherwise supported. It follows that the Panchayats are anxious for the examination of collateral facts, of matters of general notoreity and of all that enters into circumstancial evidence."

4. Court of minor jurisdiction in India after the advent of the East India Company

The East India Company also found some local courts already functioning almost on the line of village Panchayats. These courts were re-modelled from time to time by the Company which also sometimes established altogether new courts of minor jurisdiction on the model of village tribunals or Panchayats. These courts were necessarily of minoı jurisdiction following very simple and speedy procedure unattended by any rigid formality or technicality. Reference may be made in this connection to the Choultry court at Madras,[39] the Court of Conscienee in Bombay and

38. The administrative machinery was mainly based upon the Muslim system. The Hindus would hardly go before the Qazis for getting their cases adjudged by them. This was in civil cases. But in criminal cases, there was no strict distinction between the Hindus and Muslims. The same Muslim criminal law would govern them all. This was in fact the general feature of the entire judicial administration of the Muslim rulers.

39. The Hindu law was mainly administered by their own caste-courts and guilds.

At its origin, Madras was divided into the White Town and the Black Town. The

the Courts of Requests at each of the Presidency towns of Calcutta, Madras and Bombay. In the village of Madraspatnam, there functioned from a very early time a Choultry court which was based on the usual pattern of village administrative unit also entrusted with judicial functions. The village Headman known as Adigar was to sit in the Choultry court and decide small civil and criminal disputes and minor breaches of the peace. This was the only court for the Black Town. For serious offences reference had to be made to the native Raja. The Choultry court was re-organised by Streynsham Master who became the Governor of Madras in 1678. Formerly an Indian officer was to preside over this court, but after the re-organisation it came to be presided over by the English servants of the Company. This court could decide civil cases upto the value of 50 pagodas and it could try criminal offences of minor nature. After the creation of the Mayor's court at Madras, the jurisdiction of the Choultry court was much diminished. Its civil jurisdiction was limited to only two pagodas; appeals from the Choultry court would lie to the court of Governor and Council which came to be known as the High Court. This High Court could not try cases originally which were cognizable by the Choultry court; it had only the right to hear appeals from the Choultry court. According to the scheme of 1672, a central court consisting of one judge was established at Bombay. Below this court was created another court of petty civil jurisdiction under the name of "Court of Conscience". This court was mainly intended for administering justice to the poor free of cost. No court fee was charged in cases to be decided by this court which would sit only once a week and which was empowered to try cases below twenty Xeraphins. The procedure followed was summary and no use was made of the jury. George Wilcox who was the judge of the main court was also to preside over this Court of Conscience.

The charter of 1753 not only modified the jurisdiction of the Mayor's court, but also created a Court of Requests at each of the Presidency towns of Calcutta, Bombay and Madras. These courts were intended to dispose of petty cases speedily and cheaply. The jurisdiction of these courts was

former town consisted of the factory of the Company along with the European residents including the servants of the Company. The latter town grew out of a village Madras patnam. One Francis Day obtained a plot of land from the local Raja and founded a Fort there under the name of Fort St. George in 1639. This came to be known as the White Town on account of the settlement of the white people therein The Company also was empowered to mint money and govern the village Madraspatnam which was a very obscure one adjacent to the Company's fort. In course of time the village Madraspatnam grew considerably and attracted a large number of people on account of the expansion of trade and commerce there. This town came to be known as the Black Town.

fixed at only five pagodas. The commissioners were to sit as members of these courts three at a time by rotation only once a week. The number of commissioners was to be between eight and twenty four. The first commissioners were appointed by the Governor and Council. The Act of 1797 made some important modifications in the jutisdiction of the Courts of Requests. Their jurisdiction was extended from five pagodas to eighty rupees, because these courts were found to be very useful and convenient. A pagoda was a small gold coin equivalent to three rupees.

The creation and the functions of the above courts of petty jurisdictions were directly or indirectly influenced by the conceptions of the popular courts or the Panchayats.

During the rule of Maharaja Ranjit Singh also, the Panchayat system was widely prevalent. There were Panchayats in villages and small towns as well. They used to administer both civil and criminal law. As it is gathered from the light thrown upon the administration of Maharaja by the European scholars, the Panchayats consisted of two very honest, upright and experienced men of high character and integrity. Only such highly competent persons could be appointed as the members of the Panchayats. Like the Indian Penal Code or the Criminal Procedure Code of the present time, there was no law book binding on the Panchayats for substantive or adjective law. Cases arising out of debts, marriages, theft, forgery and disputes relating to property were settled according to the customs of the country. But the law of inheritance and partition were based on precedents and old decisions as indicated by the records to be available from the Qazi Khana or the law office of the Maharaja. The witnesses used to take oath by the Holy Granth or the holy waters of the Ganges. This procedure was more or less followed in the British Indian courts also. Spies were engaged for tracing theft and stolen articles. And if the foot-prints of a thief were traceable in a particular village, the inhabitants thereof would be responsible for tracing the thief and getting him arrested through the Panchayats. Ordinary disputes like affrays etc. were heard and decided by the head of the area concerned, known as the Taulakdar who could inflict fines and corporal punishment. Thefts and dacoities were very rare. Disputes generally arose out of lands ; but the Government never used to pay much heed to such cases. The village people used to settle among themselves after fighting. There are some records to indicate that the Maharaja also used to try some cases himself. But efforts were always made to effect amicable settlement wherever possible. Ordinarily each case was decided by the Panch and the other

members of the Panchayat.[40] "Even in the 20th century," rightly observes Kane,[41] "in the Bombay presidency under the Village Police Act (Bombay Act VIII of 1867), the village headman (called police patil) has the authority to try and on conviction to punish with confinement for a period not exceeding twenty four hours any person charged with the commission of petty assault or abuse within the limits of a village and the person convicted has no right of appeal to any court or Magistrate against such conviction and only the High court has the power to entertain a petition for revision (which it hardly ever does)."

Besides the Panchayati courts[42] and other courts, referred to above, certain states have some other courts of minor jurisdiction such as the courts of the Honorary Munsiffs in Uttarpradesh, courts of Mamlatdars, village Munsiffs in Bombay and the village courts in Madras. These courts are constituted and function under the respective state enactments.

The constitution of India has rightly provided for a Directive principle of state policy by Article 40 which lays down : "The state shall take steps to organise village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government." As a matter of fact, the entire constitution of India was to be based on the village republics as the units. Dr. Rajendra Prasad[43] him-

40. It appears from the Sanchi Stone Inscription of Chandra Gupta II that the Panchayats werer called Pañca maṇḍalī (Vide Gupta Inscriptions, pp. 29, 31.)

Again the Damodarpur plates (Epigraphia Indica, 15, p. 130) there occurs the name of one Dhritimitra who is described as "Prathamakulika." The word Pañca kula meant some high official in Gujarat and Kathiawar, (Vide Indian Antiquary, Vol. II, p. 220).

According to Kauṭilya's Arthas'astra, (III,10) the grāmika or the gramakūṭa exercised some summary judicial powers.

41 History of Dharmas'āstra, Vol III, p. 282.

42. According to the Tagore Law Professor of the Calcutta University, 1953, J.D.M. Derrett also "a wide discretion was given to the caste tribunal and in pre-British times, its jurisdiction was as wide as important and as effective as that of a civil or criminal court. Vijñānes'vara (Mitākṣara on Yānj, III, 300) takes pains to illustrate the powers and duties as well as the constitution of caste-tribunals. One illustration may be given of an injunction unquestionably binding in conscience which might have been enforced in certain localities at certain periods but which was certainly not universally enforced... .."
A.I.R. 1953 (Journal section) p. 59.

43. He happened to express his opinion on the 10th May 1948 By that time the constitution making had already made sufficient progress. Hence Sir B.N Rau dealing with this aspect of the question pointed out that though he had great appreciation for this idea, still it had already become too late to make any attempt to change the basis of the constitution. Hence it was rightly observed by Shri T. Prakasam "it must be acknowledged on all hands that it is a construction which is begun at the top and which is going down to the bottom. What is suggested in this direction by Dr. Rajendra Prasad himself was that the structure must begin from

self expressed his opinion in favour of having village republics as the basis of the Indian constitution. The discussion that took place in the Constituent Assembly in this connection was immensely illuminating. Shri T. Prakasam underlined the village Panchayat system in very strong words.[44]

The village Panchayats,[45] as contemplated in the constitution of India, were intended to be self-sufficient units of self government. The Panchayat system, when fully organised and given full effect to, will undoubtedly play a very considerable role in the whole programme of village uplift. The village Panchayats were already existent in India from very ancient time; but they became very insignificant during the British rule in India with the result that the villages were totally neglected and the artificial city life was made to flourish. The soul of India was to be found in the villages and not in the towns. It is for this reason that Mahatma Gandhi, the father of the nation, said pointing to Delhi, while speaking at the Asian Relations Conference: "This is not India; you people are seeing Delhi, this is not India. Go to villages; that is India, therein lives the soul of India." He further elaborated his idea of a village Panchayat or village republic or village swaraj thus: "My idea of village swaraj is that it is a complete republic, independent of its neighbours for its vital wants and yet interdependent for many others in which dependence is a necessity. Thus every village's first concern will be to grow its own food-crops and cotton for its cloth. It should have a reserve for its cattle, recreation and play-grounds for adults and children Then if there is more land available, it will grow useful money-crops there, excluding ganja, tobacco, opium and the like. The village will maintain a village theatre, school and public hall. It will have its own water works ensuring clean supply. This can be done through controlled wells and tanks. Education will be compulsory upto the final basic course. As far as possible, every activity will be conducted on the co-operative basis. There will be no castes, such as, we have today, with their graded untouchability. Non-violence with its technique of satyagraha and non-co-operation will be the sanction of the village community............There will be a compulsory service of village guard who will be selected by rotation from the register, maintained by

the foundations and it must go up. That is the constitution which the departed Mahatma Gandhi indicated and tried to work up for nearly thirty years......This gives opportunity to the people of every province and the whole of India to go on this basis and work up the whole thing without interrupting the progress of the constitution at this stage."

44. Constituent Assembly Debates, Vol. VII, No. 10, p. 5-2.

45. Constituent Assembly Debates, Vol. VIII, No. 10, p. 523.

the village. The government[46] of the village will be conducted by the Panchayat of five persons annually elected by the adult villagers—male and female possessing minimum prescribed qualifications." Though from the above discussion it clearly follows that the village Panchayats have got a comprehensive list of multifarious duties, still it is undeniably true that the most important functions that have been ascribable to them are the administrations of justice in cases both civil and criminal. These functions are supposed to be by far the most important particularly in view of the fact that litigation has been largely responsible for the ruination of the village economy. The complicated legal machinery of the country, specially during the British administration, entailing too heavy expenditure and involving too great delay, was causing great harassment to the village people and was one of the greatest impediments in the programme of village uplift. A less costly judicial system, capable of speedy disposals of cases, was what was wanted for the amelioration of the economic condition of the people. Hence as a matter of fact, every state has started village Panchayats essentially with the same purpose of ensuring the most efficient administration of the villages, differing more or less only in details. Reference may be made in this connection to the Punjab Gram Panchayat Act (Act IV) of 1953. The very preamble of this Act shows that it was passed for "better administration in the rural areas of the Punjab by Panchayats." Provisions have been made for the administration of justice —civil, criminal and revenue, by chapters IV and V. The extra-judicial powers and functions have been defined and enumerated in chapter III. Some of the provisions of this Act deserve special notice. Thus for speedy and effective disposal it has been provided by section 66 (1):

"The provisions of the Code of Criminal Procedure, 1898, the Code of Civil Procedure, 1908 and of the Indian Evidence Act, 1872 shall not apply to proceedings before Panchayats, save to the extent mentioned in this Act, but the Panchayat may ascertain the facts of any criminal case or civil or revenue suit by all legitimate means in its power and thereafter pass such order, sentence or decree as may be in accordance with justice, equity and good conscience."

Again section 47 (1) provides *inter alia* :

"The Panchayat shall, if possible, try a criminal case and pass orders on the day on which the accused appears and if that it is not possible, may, if he is not already on bail, require him to execute a bond with or without

46. Constituent Assembly Debates, Vol. VII, No. 10, pp. 523-24.

sureties for a sum not exceeding five hundred rupees to appear before the Panchayat on any subsequent day or days to which the trial may be adjourned."

The most important provision has been made by section 70 which runs as follows :

(1) A woman or any other person specially permitted by a Panchayat being a party to any judicial proceedings before it may appear through an agent authorised in this behalf.

(2) For the purpose of this section "agent" shall not include any legal practitioner or any person employed as a clerk to any legal practitioner or any petition-writer or a tout, declared as such under section 36 of the Legal Practitioners Act, 1879.

The reasons for the exclusion of legal practitioners, clerks, deed-writers and touts[47] are obvious. The trials and proceedings before the Panchayats are desired to be absolutely bonafide, non-technical and simple. Though the administration of justice has been largely entrusted to the Panchayats which will be constituted by men not usually trained in law and though legal practitioners, their clerks, and deed-writers have been excluded from the operation of the village Panchayats, still some wholesome provision has been made by sections 51 and 65 according to which the District Magistrate and the District Judge have been given wide powers of revision. Thus the District Magistrate can cancel or modify any order of a Panchayat or direct the re-trial of any criminal case by the same or any other Panchayat of competent jurisdiction or by a court of competent jurisdiction subordinate to him, if he is satisfied that there has been failure of justice. Similar powers have been given to the District Judge regarding civil and revenue cases, tried by the Panchayats on point of fact or law. No appellate jurisdiction has, of course, been given against the decisions of the Panchayats.

Provision also has been made for establishment of Thana Panchayat Unions.[48]

5. Administration of Hindu law under the foregoing and contemporary Non-Muslim rulers

As it has already been seen, the Muslim rulers including the Sultans and the Mughal emperors underlined the administration of criminal justice and hence the royal and imperial courts including the rulers themselves used to administer Muslim law of crimes to all including the Hindus and

47. For touts, see section 36 of the Legal Practitioners Act.

48. Chapter VIII of Act IV of 1953 provides for the constitution and function of the Thana Panchayat Unions by sections 88-94.

the Muslims. So far as the personal laws of the people were concerned, it is quite clear that the Hindu personal laws governing marriage, inheritance, adoption and other topics of law, more or less connected with the religion of the Hindus, could not be and as a matter of fact they were never actually administered by the Muslim courts. This was the general condition of the society prevailing up to the time of the advent of the British Company. The Hindus never gave up their personal laws at any time; though they might not have been administered by the Muslim courts, yet there were the caste people and caste tribunals which used to administer the Hindu laws for the Hindus. Thus the personal laws of the Hindus and Muslims became more and more differentiated and prominent. The pure personal laws of the Muslims again connected with the Mahomedan religion were administered largely by the Muslim courts manned by Muslim officers. The cases which were neither criminal in nature nor based purely on personal laws could under certain circumstances be tried by the Muslim courts even when the parties concerned were of different religious persuation. But such cases were very few and far between. That the personal system of the Hindu law and the Muslim law were actually in application is clearly indicated by the provision that had to be made in the judicial plan of Warren Hastings in 1772; according to this provision, the Diwani Adalats were directed to decide all cases of inheritance, marriage, caste and other religious usages and institutions according to "the laws of Koran with regard to the Mahomedans and laws of the Shaster with respect to the Hindus." This provision had to be made only on account of the fact that the Hindu law also, as based on the Shaster or the Dharmaśāstras was found prevalent in the Hindu society. This might be regarded as the general condition of Hindu law through out the whole of the Mahomedan period. The famous historian Sir J. N. Sarkar also refers to some Brahmanic courts sanctioned by the emperor Akbar. These courts undoubtedly followed Manu and other text-writers and the rules and injunctions enunciated by them which were appealed to by the Hindu litigants at the end of the Mughal period. Some Sanskrit judgments also of these courts are said to have survived upto these days. Nevertheless, it is another indication that the Hindu law, based on the original texts was alone binding on the Hindus of the period. The case of the emperor Akbar might be quite exceptional; on account of his conciliatory policy towards the Hindus, he might have provided them with special courts for the administration of their personal laws. Nothing like this seems to have been done by any other Muslim ruler. In any case the Hindus adhered to their own personal laws even though they were under the Muslim rulers. The scheme of Warren Hastings

also fully corroborates this prevalence of Hindu law among the Hindus, otherwise perhaps he would not have made provision for two systems of personal laws. This indicates a stern reality which could not be overlooked or ignored by the foreigners even.

What we find in the Muslim period is but a virtual continuation of the application of the Hindu law which was in actual existence from time immemorial. The records and the informations derivable from the time of the East India Company also are too unmistakable to leave any room for doubt in the mind of an unbiased student of history. This continuity of the influence of Hindu law in governing the Hindus most eloquently testifies to the actual working of the Hindu system, as we find it described in the original Dharmasūtras and the Dharmaśāstras. Trials by ordeals may serve as very instructive illustrations on the point. Though as a matter of fact, there was hardly any mention of ordeals in the Dharmasūtras and though Manu and Yājñavalkya refer to only a few ordeals, still with the later Smriti-writers like Nārada, Brihaspati and Kātyāyana, we find a larger number of ordeals. These ordeals were found to have been in use even during the Maratha rule and the rule of Maharaja Ranjit Singh, not to speak of their earlier applications. Thus according to the Smritis,[49] ordeals by water, fire, weight and poison were used in the early Hindu society as efficient instruments for ascertaining the truth. In the Rājataranginī[50] there is an illustration as to how a Brahmin murderer was found guilty by taking recourse to a test in the form of an ordeal. In this case a Brahmin was alleged to have murdered another Brahmin. No other evidence was available. Hence an ordeal was supposed to have been devised by divine inspiration. Rice flour was scattered round a temple and the alleged offender was asked to walk round the temple. If the prints of Brahma hatyā were to be seen after those of the accused Brahmin, then he was to be adjudged guilty; in this case foot prints were visible and so the accused was found guilty and duly punished. During the Maratha rule[51] also when no other evidence was available divine aid was freely invoked and ordeals applied. Ordeals were actually used even during the time of Maharaja Ranjit Singh.[52] Some military papers indicate that in 1843 Vikrama Samvat corresponding to 1797

49. Early History of India, p. 315.

50. Book IV, verses 53 *et seq*.

51. Vide chapter III of Village Communities of West India, by Dr. Altekar.

52. See pp. 218 *et seq* of the book on Maharaja Ranjit Singh, written by Sri Sita Ram Kohli in Punjabi.

A. D. when some soldiers of Laffut created some disturbance and mutiny, some were dismissed from service and others were fined. One Kahan Singh had his ears severed[53] and his forehead marked[54] with a red-hot iron. And Jamait Singh proved his innocence by putting his hands in boiling oil; when found innocent, as the result of the application of an ordeal, he was not only set free but he was also raised to the rank of a Naik. Though there was amputation as the form of punishment for heinous offences and also the method of marking the forehead of the criminals with red-hot irons, still there seems to have been no capital punishments during the rule of Maharaja Ranjit Singh. Capital punishment was undoubtedly provided for by the writers of the original texts, but it clearly follows that sometimes they were dispensed with under special circumstances. This does not mean that the provisions the Smritis were not followed, but that they were used subject to modifications and amendments that were deemed necessitated by the exigencies of the time concerned. What is actually found in the records is that the Maharaja severely reprimanded some of his governors and indicated his disapproval for capital punishment. An English writer has written that once the Maharaja ordered that the hands of an offender should be severed and this order was given in the presence of that historian and that gentleman showed his surprise as the Maharaja looked towards him and said, "We always punish but never kill."[55]

Jayaswal refers to one Sanskrit judgment which was discovered in a village of Darbhanga in the province of Bihar. This judgment or "jayapatra" was written on a pattern described by Brihaspati. The date of this judgment is said to be about the year 1794. This is a clear indication that the application of the Hindu law according to the original texts continued even upto the recent times. A jayapatra of similar nature belonging to the middle ages has been referred to by Jolly.[56] This judgment was found in Java. These jayapatras will be fully discussed in the next chapter along with other decisions.

Reference has already been made to the different kinds of popular

53. Amputation was to be found as a form of punishment in the ancient Smriti texts as well as in the administration of justice by the Muslim rulers.

54. The form of punishment also was found in the Smritis. The offenders were to be marked in the forehead to indicate their crimes. These forms of punishment described by the original Smriti-writers were actually applied by the subsequent rulers indicating clearly that the whole of the administration was based more or less on the ancient legal literature.

55. Maharaja Ranjit Singh, by Sita Ram Kohli, pp. 219 *et seq.*

56. Hindu Law and Custom, p. 319.

courts that existed in ancient and medieval India and that are still found to exist in some modified form. From these unmistakable evidence "no unbiased student of the Smriti literature can assert that the system whose beginning and developments are traceable from stage to stage was wholly imaginary or ideal. The rules laid down are so detailed and practical and their development is so natural that they must have been the result of actual experience in the daily administration of justice[57]......The Dharmaśāstra works have been produced from different parts of the country and some of the commentaries and Nibandhas were produced under royal patronage or by authors who were themselves associated with public administration as ministers or judges. Āpastamba was (according to Jolly) of the Andhra country. Baudhāyana of South India, Nārada of Nepal, Medhātithi of Kashmir, Aparārka belonged to the Konkan, Haradatta to South India and Nanda Paṇḍita to Benaras. The author of the Subodhinī belonged to North India; Vijñāneśvara produced the Mitākṣarā under the patronage of the Chalukya rulers; Hemādri was a Minister of the Yādavas of Devagiri; Lakṣmīdhara was a Minister of Kanauj; Caṇḍeśvara was a Minister and judge under one of the Mithila rulers; Mādhava was a Minister of Vijayanagar and Vācaspati Miśra was a court paṇḍit under one of the later Mithila rulers. The author of Nrisinha prasada was a Viceroy (at Devagiri) under one of the Ahmednagar rulers and the author of the Sarasvatī vilāsa was a ruler of Orissa. Why should they all have indulged in the pastime of writing about a system of judicial administration which never existed?.........Professor Jolly rightly adds that law and procedure in places like Burma and Java and the practice prevailing all over the country in the matter of the drafting of documents and royal grants show that the Smritis represented existing practice."[58]

Though the Muslim rulers did not administer Hindu personal law themselves or through their courts, there is hardly any doubt that the Hindu kings of ancient times and the Hindu rulers contemporary with the Muslim rulers invariably applied the Hindu law for the governance of their subjects. According to the Buddhist pilgrims Fahian and Hiuan Tsiang who visited India respectively in the 5th and the 7th century A.D. fine was the usual form of punishment and amputation of limbs was prescribed for exceptionally serious and heinous crimes. These are the very punishments prescribed by the ancient Dharmasūtras and the Dharmaśāstras. Capital punishment was hardly in vogue though it was

57. The existence of these various terms is in itself a strong evidence demonstrating the reality of the institutions designated. Local Government, by Dr. R. K. Mukherjee, p. 35.

58. The Hindu Judicial System by S. Varadachariar, Judge, Federal Court, pp. 231-32.

theoretically sanctioned. The different kinds of ordeals by water, fire, weight and poison were in use: They also follow from the provision of of the texts. Reference may be made to the Sanskrit drama Mṛicchakaṭikam which gives a very realistic picture not only regarding the broad points of the judicial system but also some minute details in an imaginary trial. Though the date of the composition of the drama is not known for certain, still there is no doubt that it must have been written at a time after the Dharmaśāstras, as all the legal doctrines and principles that have been illustrated in the drama are readily from the Dharmasūtras and the Dharmaśāstras. This fact indicates that the rules enunciated in the Smriti-texts were also applied in actual practice in the society.

Act IX of the drama contains the trial in question. The allegations were that Vasantasenā, a prostitute, was murdered by a merchant Cārudatta. Evidence was taken and Cārudatta was found guilty for having murdered Vasantasenā, though as a matter of fact, Cārudatta did not know anything at all about the allegations and though she was not murdered at all. Vasantasenā was brutally assaulted by Sakāra, the brother-in-law of the king Pālaka, and when she became senseless, Sakāra took her to be dead and covered her body with leaves. Sakāra had enmity with Cārudatta, as Vasantasenā loved the latter in preference to him. So the case was started by Sakāra against Cārudatta. Inspite of the utmost care taken by the judge, in examining witnesses and taking evidence, by curious coincidences, Cārudatta was adjudged guilty of murder, though happily enough, Vasantasenā physically appeared in the execution ground whereupon Cārudatta could be released.

The complainant in this case, Sakāra was a man of questionable character and it is for this reason that the judge wanted to avoid him by saying that his complaint would not be heard on that day. At this Sakāra naturally became very angry and threatened the judge that he would get him replaced by another judge through his brother-in-law, the king; eventually the judge agreed to admit the complaint. When Cārudatta was given a seat in the court room, it was objected to by Sakāra. Again while narrating the alleged story of murder, he accidentally spoke out that Vasantasenā was murdered but "not by me". The judge at once asked the clerk to note it down as a very important statement. Perceiving his inadvertance, Sakāra tried to wipe out the writing. In course of the trial, the incidents so conspired together that inspite of the best circumspection of the judge, the real truth could not be ascertained. In course of the scuffle between Sakāra and Vidūṣaka, some ornaments belonging to Vasantasenā fell down from the person of the latter who was

a friend of Cārudatta. The question of identification of the ornaments was very realistically examined; but it created a very unfavourable impression in the mind of the judge, for one of the main allegations was that Vasantasenā was murdered by Cārudatta for greed of these ornaments. But as a matter of fact, these ornaments were given as presents to Cārudatta's son, Rohasena, by Vasantasenā herself. Cārudatta decided to return these ornaments to her through Vidūṣaka who while carrying the ornaments came to know about the trial of Cārudatta, entered the court room and had a scuffle with Sakāra. Again when the court wanted to ascertain if there was any dead body of a woman in the alleged place of murder, the captain of the city police, Vīraka went to the alleged place of murder and there actually saw a dead body of a woman being torn to pieces by wild beasts. This death again was caused by the fall of a tree on the previous night. Thus all pieces of evidence curiously conspired to convince the judge that Cārudatta had really murdered Vasantasenā. This trial indicates the inherent difficulties of administration of justice. The judge himself realises this and expresses it more than once. But he was unable to arrive at the truth and convicted a man who was really not guilty at all. Besides these details, there are some broad points of law which have been illustrated by this trial. Thus the diffculty of adjudication, the high qualifications on the part of the judges, the efficacy of ordeals[59] as an instrument of evidence and the immunity of Brahmins[60] from capital punish ment have been clearly described on the lines of the original texts. In the Rājataranginī[61] also which is a chronicle of Kashmir, written in the 12th century A. D., there are some references to trials which indicate the application of the doctrines that are to be found in the Dharmasūtras and the Dharmaśāstras. In one of these cases[62] the king could ascertain

59. Cārudatta, though absolutely innocent, was convicted of murder and he was complaining that had ordeals been used in his case, he could prove his innocence. Thus the use of and faith in ordeals are indicated from this drama.

60. According to Manu and other text-writers, a Brahmin was not to be capitally sentenced. But in the present case, Carudatta, though a Brahmin, was sentenced to death against the injunction of the S'astras, because herein the king wanted to make an example of Cārudatta. This capital sentence surprised the judge even.

61. Regarding the historical reliability of the Rajatarangini it has been said by Sir A. Stein that the author's descriptions might be taken to be a reliable account of what he actually saw in his own time.

62. This case refers to the decision that was made by the king Candrāpīḍa; Book IV.

the truth only through some divine guidance and inspiration.[63] The king could not punish a man unless there was clear evidence of his guilt. Though it is very difficult to ascertain truth, still the king has to make the best and the sincerest efforts to arrive at the truth, otherwise the miscarriage of justice will make the king liable to go to hell. In the second case also,[64] the king took some extra-ordinary steps to find out the truth and the result was that the forgery could be detected. Herein a document was executed subject to a condition that the property in question was to be conveyed without a well with steps—"Sopānakūparahitam." But the official recorder (adhikaraṇalekhaka) forged the condition to be "Sopānakūpasahitam." The king could after all ascertain the truth after examining the accounts of the defendant who spent a sum of money for the purpose of this forgery. The guilty man was found out. This case illustrates one of the main doctrines of the Smritis that the the king and the judges should be diligent enough to make a thorough investigation into an allegation, so that the actual truth can be found out. Again the later Pallava inscriptions which were written in Sanskrit, unlike the earlier ones which were written in Prākrit, claim that the kings were the protectors of the Varṇāśramadharma which was also the mainstay of the whole Hindu religion and the Smriti literature. In the Marathi records and the inscriptions of southern India we find unmistakable indication that the most of the administration of justice was effected by the caste-courts and village Panchayats which derived their inspiration from the ancient Smriti texts. This question has been already examined at some length towards the earlier parts of this very chapter.

The Vijaynagar kings also, like the Pallava kings, claimed themselves to be the protectors of the Varṇāśramadharma and they followed the essential judicial tenets, based upon the Dharmasūtras and the Dharmaśāstras.

Shivaji also had a council of eight ministers. The Nyāyādhīśa was the minister in charge of administration of justice. The judicial minister was to be a Brahmin, well-versed in the Śāstras. The whole

63. Sir Henry Maine in his Ancient Law develops a theory that the oldest form of law in the world is represented in the Themistes, referred to by Homer. As a matter of fact these are decisions or judgments given in particular cases brought before the Chief for decision, the judgment being supposed in every case to have been derived by direct inspiration from the Gods. This theory, no doubt, has been criticised by other jurists including Dr. N. C. Sen Gupta, (*Evolution of Law*, p. 15).

64. This case was supposed to have been decided by king Yas'askara, Book VI.

administrative and judicial systems of the Maratha rulers in general and Shivaji in particular were essentially modelled upon the ancient Arthaśāstras and the Dharmaśāstras. Qualified judges were appionted in the towns also besides the capital. The Panchayats were the usual courts for administering civil and criminal justice. Murder was regarded as a crime as well as a sin ; hence even when pardoned, a murderer had to expiate by performing penances according to the provisions of the Śāstras. In cases of theft, if the property could not be re-covered, the aggrieved party was to be compensated by the police or the villagers where the offence was committed. A village could be exempted from the liability only when it could show that the offender could be traced to some other village. This was exactly provided for by many Smriti texts.

In Mysore also it was found that the administration of justice among the Muslims was entrusted to the Qazis who would apply Muslim law for this purpose. But the Hindus among themselves were to be governed either by customs or by the rules of the Śāstras. This was the general scheme of administration of justice during the whole of the Muslim period—under the Muslim rule ; from an[65] account of the judicial system of Maharaja Ranjit Singh also, it will be clearly seen that the administration of justice under the Maharaja was essentially based on customs and the tenets of the text books on Hindu law. As according to the Smritis, the king was enjoined to administer justice himself as well as through learned and otherwise qualified judges, so the Maharaja also used to decide cases sometimes personally and sometimes through the officers, appointed for the purpose. Some cases actually decided by the Maharaja appear from the records.

65. See Maharaja Ranjit Singh, by Mr. Sita Ram Kohli, written in Punjabi, pp. 218 *et seq.* For details of the judicial systems of the Marathas and Ranjit Singh, see chapter XII, *supra*.

CHAPTER XII

Hindu Law in the Judicial Systems of the Maratha Rulers and Maharaja Ranjit Singh with Special Reference to some Judgments of the 17th and the 18th Centuries.

1. Introduction

The place occupied by the Maratha and the Sikh rulers is very significant from the standpoint of Indian Legal History in general and the Hindu Legal History in particular. Coming, as they did, mostly as the contemporaries of the Muslim rulers on the one hand and the administrators of the East India Company on the other, they had necessarily to face some revolts and conflicts and compromises and reconciliation. The contemporary records will clearly show the retention and sometimes the revival of the Hindu rules and traditions inspite of the influence and predominance of the Muslims. The Muslim conquest undoubtedly affected the natural growth of Hindu law, but it could not totally stop it. Thus C. J. Stevenson Moore[1] was perfectly right in asserting that "when eventually the first flood of Musalman invasion coming down the Ganges did overspread Bihar, it subsided leaving Mithila with Hindu king still holding courts where poetry and learning were alone honoured."[2] What was supposed to be true of Bihar was true of the whole of the sub-continent. The Maratha rulers, specially Shivaji, were responsible in a greater degree for the revival of the traditions of the Hindu legal administration than the Sikh rulers. The contrast between the Marathas and the Sikhs has been emphasised by Dr. K. P. Jayaswal :[3]

"But when there was a Hindu revival in the time of Shivaji and the Sikhs, the Sikhs as a polity failed. They failed because they could not connect themselves with the past. They followed a system which prevailed around them and established a polity of one man's rule. Guru Govinda wanted to remedy it, but the attempt brought about no man's rule. It was the "Padshahi," the Mughal form in success and defeat, in rise and in fall. But the movement, in the Maratha country had a different history. There they looked into past history and drew up a

1. Muzaffarpur Survey and Settlement Report.

2 *Ibid*. "...(Indian) history does not centre round valiant feats of arms but round courts engrossed in luxurious enjoyment of literature and learning."

3. Hindu Polity, chapter XXXVIII, p. 365.

constitution and founded a polity on materials that were easily available to them, but the materials which connected them with the past. They consulted the Mahābhāra ta and the Śukranīti and found that king should reign but not rule, that Government should be vested in a Ministry of eight ministers. And they founded the Aṣṭapradhāna.[4] They searched out technical terms from political literature of the country and drew up a Rāja Koṣa or Book of State terms. Yet the system tried was only one portion of Hindu polity, one-half of the whole body. They had the Parishad but they had not the Paurajānapada. To their great credit, it must, however, be said that in modern times they were the first to realise that one man's rule was not allowed by the wisdom and experience of their fore-fathers, that it was foreign to the genius of their Śāstras. Their limitations were the limitations of darkness and ignorance about the constitutional history of the country, a darkness which we have not yet fully removed three centuries after......The test of a polity is its capacity to live and develop and its contribution to culture and happiness of humanity. Hindu polity, judged by this test, will come out very successfully."

2 The judicial system of the Marathas in the Deccan

Though the Muslim power was consolidated in Northern and Central India by the close of the 12th century, still the Muslim penetration into the South began only towards the close of the 13th century. The Yadav Dynasty of Devagir came to an end in 1318 and Muhammad Bin Tughluq ascended the throne of Delhi in 1325. This was the beginning of the introduction of the Muslim system of administration in the Deccan. The Sultanate of Delhi was overthrown by the founder of the Bahamani kingdom in 1347. Towards the close of the 15th century the Bahamani kingdom was divided into five separate monarchies which were conquered by the emperor of the Delhi towards the latter part of the 17th century. Shivaji succeeded in having established an independent kingdom in 1674 which existed in varying forms until 1818 A.D. After the death of Shahu in 1749, the "Mukhya Pradhān" or the Peshwa became the *de facto* ruler of the Maratha state. Though there were some varying forms of difference between each of the forms of rule or administration, referred to above, still for the purpose of Hindu Legal History, we are immediately concerned with the Muslim system of administration of justice on the one hand and the Maratha system of administration of justice on the other

4. S'ukranītisāra, II, 71-72.
Aṣṭaprakṛitibhiryukto nṛipaḥ kais'citsmritaḥ sadā
Sumantraḥ paṇḍito mantrī pradhānasacivastathā
Amātyaḥ prāṇvivākas'ca tathā pratinidhiḥ smṛitaḥ.

which was largely responsible for the revival of the traditional Hindu legal institutions and notions. There were obviously many remarkable points of contrast also between the North and the South as rightly asserted by Dr. Jolly[5] and Sir J. N. Sarkar.[6]

According to the institutions of Muhammad Bin Tughluq, the system of judicial administration consisted of two parts, to wit, the central and the local. The former consisted of the Sultan, the Naib and the Vazir and Qazi-u-Quzat, the last-named officer being the head of the department of justice which was known as the Diwani-i-Qaza. The latter consisted of graded units, such as, the Iqlim (province), the Shiq (district), the Shadi and the village. For each of these units different officers had to be appointed for the administration of justice. The Amir (who was an officer for the Shadi) was to be assisted by some Hindu officers, such as, the Mutsarif, the Chauduri, the Patwari and the Muqaddam. The same system was more or less followed by the other Sultans also upto 1650. One of the most important innovations introduced by the Bahamani Sultans was the constitution of the Majlis[7]—meant for each Pargana,[8] Taluk and village. But the most important modifications were introduced by Shivaji who was followed by his successors including the Peshwas even for some years after the close of 18th century. Shivaji made enthusiastic efforts to revive the Hindu tradition, enshrined in the original Sanskrit texts, regarding the administration of law and judicial institutions. At the beginning of his career, when Shivaji was a mere Jagirdar under the Bijapur Government, he used to administer justice through Majlis which was nothing but the combination of the royal officers and the Gotas. But after the coronation[9] when Shivaji became a king,

5. "......Several of the earliest Smritis have originated in the South of India. When the era of the commentaries arrived, the Deccan continued to be in seat of legal learning...(Tagore Law Lectures, 1863), p. 24.

6. Mughal Administration, p. 116,

7. Originally under the Hindu Rājās, the inhabitants of a village would meet in an assembly or council to adjudicate disputes between the different villagers. This system also was not discarded by the Sultans. And towards the close of the Sultanate, the Majlish came into being. The Majlish was nothing but the combination of the people constituting the Gota and the Government officers, named Diwan. For further details of the popular assemblies see Altekar, Village Communities, pp. 21-23.

8. The Pargana Majlish played a very prominent part in the administration of justice during the Sultanate. It is believed that the Qazi was greatly responsible for ushering the Majlish into existence by bringing together the Diwan and the Gota. For details, see Judicial System of the Marathas by V. T. Gune, pp. 17-18.

9. It took place according to the Vedic rites.

he used to decide important suits with the help of the Dharmasabhā which was the development of the Majlis of a Pargana, resembling its Hindu prototype, as described in the text books of Hindu law.[10] To perform the duties of Hindu monarch according to the Hinduśāstra tradition,[11] he included in his council two ministers the Nyāyādhīśa[12] and the Panditrav—trying suits through the Dharmasabhā in open courts including the Rājmudrā. The judicial system of Shivaji was followed by his successors, but Shahu made certain modifications which might be conveniently characterised as "feudalisation of justice". Shahu came to the throne in 1708 and his system was modified only by the Peshwas who were the *de facto* rulers of the Marathas from 1750 to 1818. Sahu, his Rajmandal, consisting mainly of feudal lords and other officers of the State and the Sardars, constituted his central Government. The Jagirdars and the Sardars were responsible for the local administration of the territories under their jurisdiction according to the Mokasa and the Jagir tenures. Being the highest judicial authority in the kingdom, cases were brought to him for his adjudication with the help of the Rājmudrā, the Ministers and the Sardars. Sometimes the Dharmasabhā or the judicial council also used to be called for adjudicating important disputes. The members of the Rajmandal and the Sardars also used to adjudicate cases with the help of the Majlis as well as the Panchayat,[3] when ultimately the former was replaced by the latter.

10. Yājñavalkya, II, 1-4.

11. The early judicial system or the Marathas (from 1650 to 1708 A.D.) could be divided into two departments—central and local. The former consisted of the king and the Dharmasabhā or the Hajur Majlis which was to consist of the Rājmudrā and the Gota. The local courts were instituted according to territorial units, such as, the divisions, the districts or Subas, the Taluks or Tarfs and the villages. For each of these above units there was a Majlis consisting, as usual, of elements sanctioned by both royal and popular authority. The Mokaddam alone of the village Majlis could combine both royal and popular sanction. From the above analysis it will be abundantly clear that the highest officers in connection with the administration of justice were conceived on principles of Hindu law and religion. The popular elements in the Majlis also were not unknown to the texts of law. There were so many different kinds and grades of popular courts which were at the last resort linked up with the king. Shivaji also indulged in beginning to employ terms found in the original texts of Hindu law.

12. As the highest officer entrusted with the administration of justice, next to the king, he was to have jurisdiction over all suits in the entire kingdom to try them according to the principles laid down by Dharma or law. Niraji Ranji, Pralhad Niraji, Konher Jagannath, Sakho Vithal, Honaji Anant and Kashi Anant are some of the persons who adorned this post.

13. The Panchayat was to be seen occasionally functioning along with the Majlis since 1730. Peshwa Baji Rao I and his son Balaji Rao tried to make it popular. It was

As it has been seen, the Peshwa became the *de facto* ruler of the Maratha Government since 1750, the Satara Raja having become only the titular head of the state. With this important modification of the powers of the highest executive, the judicial organs also lost their original importance and status. The Dharmasabhā and Rajmandal fell into disuse on account of the loss of importance by the Satara Raja. The Majlis also was replaced by Panchayat which latter institution continued to exist up to the end of the Maratha rule. By virtue of the Mutalqi seal and the Jagir tenure, the Peshwa or the Mukhya Pradhān became the highest judicial authority.[14] The members of the Rajmandal and the military chiefs administered justice within their own territories according to their pleasure.[15] Besides the royal institutions of justice, referred to above, there were certain indigenous judicial institutions which played a very important part in the scheme of the administration of justice, in Maratha. The chief among these indigenous institutions were the Watan, Mirash and the Upari which were most intimately connected with the system of tenures. The Watandars of the different units used to be known as the Deshak[16] under the Hindu Rajas. The Mirashi tenure was otherwise known as the Thalakari tenure which was derived from the Sanskrit word "sthala"[17] meaning the place or the specified piece of land. The Upari tenure[18] was to be contrasted with the Mirashi tenure, the former being temporary and the latter being permanent or

fully developed under Madhav Rao, when the Majlis totally fell into disuse. Cf. Selections of papers from the records at the East India House, (1826) IV, p. 219.

14. Lumsden's Report, II.

15. *Ibid.*

16. The term Deshak included the different administrative officers and as such it might be regarded in a sense as a constituent part of the Gota and not an independent institution (Vide, Bhārat Itihāsa Maṇḍal Sammelan (1837), p. 129).

17. The original settler in a village who was responsible for the cultivation of the land for the first time came to be regarded as its proprietor. (Cf. Manu. IX, 44; Kane, History of Dharmas'āstra, Vol. II. p. 867.)

18. The following lines are very significant in this connection :

"An opinion prevails in the country that under the old Hindu Government all the land was held by Miras and the Uparis were introduced as the old proprietors sank under the tyranny of the Mahomedans. This opinion is supported by the fact that the greater part of the fields now cultivated by Uparies are recorded in the village books as belonging to the absent proprietors and affords, when combined with circumstances, observed in other parts of the peninsula and with the light land tax authorised by Manu, a strong presumption that the revenue system under the Hindus, if they had a uniform system was founded on private property in soil".........Forrest, Elphinstone, pp. 279 *et seq.*

fixed. The Gota,[19] the Majlis and the Panchayats also played a very significant role in the administration of justice in Maharastra. The two former institutions having lost their administrative importance during the rules of the Peshwas were deprived of their judicial importance also. The Panchayats ultimately usurped the functions of the popular organs of judicial administration. Besides the Gota, there were also again the Brāhmaṇasabhā[20] and the Jātisabhā.[21] As it has already been prefaced, Shivaji attempted to follow the Hindu texts and tradition in administrative and judicial organisation of his government. This will at once indicate that the Maratha administration of justice was saturated with the elements of original Hindu law. The law books that were resorted to were the usual Smritis and the commentaries on Hindu law, supplemented by tradition and custom. The ordinary term for law was Dharma which might be classified as śrauta, smārta and śiṣṭācāra. The Smritis were again understood with reference to the Varnāśrama Dharma, the Guṇadharma and Naimittika, such as, prāyaścitta ; Gunadharma again could he viewed from three standpoints, such as, Dharma-pālana, Rāṣṭra pālana and Prajāpālana. So far as Vyavahāra or litigation was concerned, it was classified as substantive (vyavahārapadāni) and adjective (vyavahāramātrikā). The substantive law was again either civil (Arthamūla) or criminal (Daṇḍamūla). Civil law included topics like Strīpuṃsayoga, Riṇadāna and Saṃvivāda etc. The criminal law again was classified as Diwandaṇḍa, Devadaṇḍa and Jātidaṇḍa. V. T. Gune has referred to some interesting points of civil law as gathered from different records[22] : "Under the Sultans of the Deccan, the Muslim law was the law of the state. According to the Muslim codes, the public tribunals could not interfere with the personal law of the Zimmis i.e., the Hindus. The local Majlis was allowed to follow the Hindu law

19. The word Gota was perhaps derived from the Sanskrit word Gotra meaning family or kinsmen.

20. The Brāhmaṇasabhā consisted of learned Brahmins and used to assemble at holy places to adjudicate disputes among themselves in the social and religious matters according to ācāra, vyavahāra and prāyaścitta.

21. The Jātisabhā used to decide disputes with respect to the castes according to the caste regulatians.

22. The Judicial System of the Marathas, pp. 71-72. The author has given copious references to the various original sources consulted by him ; he has also given the dates of the relevant documents or decisions. From the above instances it is abundantly clear that the judicial system of the Marathas was virtually based on the original Hindu law of the Smritis and Nibandhas, though occasionally they were found to have deviated from them on account of some peculiar customs and traditions.

in the civil suits while adjudicating the suits of the Hindus. Thus the development of Hindu law was arrested during the Sultanate, as it was not enforced by the higher public tribunals. As a result the terminology of the Hindu law of procedure was partly replaced by that of the Muslim law, but the general procedure remained the same." But a sort of Hindu renaissance took place in the time of Shivaji which was confined not only to the substantive law but was equally extended even to the procedural law including attachment of property, the plea of *res judicata,* limitation and exparte decision—sometimes the rules being rather peculiar. Thus if there was any complicated case which would cause unusual delay in decision, the estate or the watan in question could be placed under the government custody, pending the final adjudication. Sometimes parties could be put to civil prison during the pendency of the suits. The plea of *res judicata* could be supported by the production of the previous mahzars or judgments Curiously enough, there was hardly any law of limitation with the result that complaints could be lodged at any time. In exparte trial, when the defedant was absent, the Majlis would wait for some days before announcing the final judgment. The judgments were generally known as Mahzars[23] which were closely analogous to the jayapatras[24] of Hindu law in forms and contents — rather than to the Mahzars of Persian conception. It must also be said to the credit of Shivaji and his successors that the legal terminology of the Deccan was not substantially and permanently influenced by the Muslim rule. But the same thing could not be said of Northern India in particular where almost all the legal terms

23. According to Wilson, the word Mahzar is derived from the Arabic word Hzar meaning present : "A general application or representation, a statement laid before a judge, a public attestation or a document, attested by the number of persons professing to be cognizant of the circumstances of the case and submitted with their signatures to the court; also in Northern Sarkars a written agreement given by Rayats conjointly to the Govt. for the performance of any duty." ... Wilson, Glossary, p. 321.

According to the Fatwa-i-Alamgiri, "Muhzir is the plural of Muhzur which means an appearance .... The Muhzur contains, a statement of the claim, the denial and the depositions of the witnesses. The sijil contains a repitition verbatim of the Muhzur and also of the words of the witnesses after which there is a record of the subsequent proceedings upto the final decree When there is an evidence, it forms the subject of a separate Muhzur and sijil" ...... Baillie, A Digest of Mahomedan Law, p. 753.

24. A jayapatra contains among other things a brief statement of the plaint, the reply, the evidence, the depositions of witnesses, discussions thereof, arguments, the Smriti texts applicable, the opinion of the sabhyas, the decision and the relief granted and should be signed by the Chief Justice ...." Vide Kane, History of Dharmas'āstra, Vol III, p. 380.

happened to be of Perso-Arabic origin and influence. Evidence is one of those topics in the judicial system of the Marathas which will at once reflect the most unmistakable influence of the Smriti-literature. As in the Smritis, pramāṇa or evidence has been *prima facie* classified as Mānuṣī (human) and daivī (divine) in the Maratha system. The Mānuṣī kriyā (or evidence) has been further subdivided as kāgadapatra or documentary, bhogavata or possessory and gohi (sākṣi) or oral, corresponding to the threefold division of evidence according to the Smritis, to wit, likhita, bhukti and sākṣi. Daivī evidnce or ordeals could be had recourse to only in absence of the Mānuṣī kriyā. This discrimination again has been accepted from the very Smritis Documentary evidence was given preference in the first place ; in absence of documentary evidence, recourse was to be had to oral testimony of witnesses and lastly in absence of these two types of evidence, ordeals could be resorted[25] to ; ordeals again could be applied either through some material like Agni or fire or through some divine intervention within a given period of time as means of proof. The ordeals through fire again could be of various forms, such as, Ravā divya ond Airani divya. The divine intervention also could be of three different forms, such as, kriyā divya, satya and śapatha. The kriyā divyas might be of various types, such as, Nadīci kriyā (by plunging into the holy river), or Vātici kriyā (by burning lamps) and so on. It is really very interesting to note in this connection that there are many instances of ordeals, referred to in both secular and non-secular Sanskrit literature. But curiously enough the Dharmasūtras are absolutely silent about ordeals. The earlier Smriti writers like Manu and Yājñavalkya also refer to only a very few of them ; but the maximum numbers of ordeals were mentioned and described by the later or rather the latest Smriti writers like Nārada and Brihaspati. The only inference that is possible from these facts is that in actual practice more and more reliance was perhaps being placed on the ordeals as means of proof. In the Maratha records also various types of ordeals are come across : "The śapath or kriyā consisted of two parts

25. For details regarding ordeals, see ante, chapter I According to the Maratha judicial system, the persence of the Government officer was indispensably necessary in case of trials by ordeals. In order to have a trial by means of an ordeal, the parties used to be asked to go to that "thal" or place known for the ordeals ... with a letter (cirapatra) to the local public officer and the Gota. After the completion of the ordeal, a thalapatra was to be given to the successful party. And the judgment of the Majlis was to be annouuced on the basis of this thalapatra .... For details, see Bhārata Itihāsa Maṇḍala Quarterly, p. 9.

of these the first included religious and customary performances necessary to create a holy atmosphere, such as, bathing in the holy river or well near the temple, putting round their (witnesses) necks garlands of basil or Tulsi leaves, placing upon their head leaves of the Bela tree and flowers offered to the image, together with the holy ashes and drawing seven concentric circles by water from the pots (kuṇḍa) of a shoe-maker and a painter within which they were to stand while giving evidence, while the latter part contained long exhortations[26] addressed to them by the Sabhanaik relating to the importance of high worth of truth and mentioned grave sins[27] which would befall them and their forefathers, if they would give untruthful testimony and it ended with a request to them to speak the truth remembering their forty-two generations."[28] Reference may be made to one instance of Vātici kriyā[29] (ordeal by burning lamps) which is significant for more than one reason. The judgment on this ordeal is dated 12th August, 1742 A.D. The dispute was between two Muslims, Bavakhan Ghori and Polad Shah Said regarding the Mokadami watan of village Katraj. The ordeal was performed in a mosque at Ranjangaon.[30] Besides the ordeal by burning lamps there were, as indicated by the Marathi records, many other forms of ordeals, such as, the ordeal of milk and boiled rice and the ordeal of bread, flower and ashes offered to God. Sometimes Hindus would take oath by keeping their hands on cow-dung and leaves of Tulsi plant, swearing by the Goddess Jñānadevī and the Mahārāṣṭra Dharma. The Muslims were to take oath by the Koran.

As regards the conception of crimes and punishment, it may be said that there is very little information regarding the pre-Shivaji period.

26. Similar exhortations also were found in the different Dharmasūtras and the Dharmaśāstras—according to the caste and profession of the witnesses. Cf. Manu, VIII, 88.

27. Besides the risk of losing the religious merit, acquired by the different forefathers, the witnesses themselves were exposed to the infliction of punishment by the God Varuṇa, who, as the upholder of moral sovereignty, would severely punish transgressors in general and the untruthful witnesses in particular. See ante, chapter II.

28. V. T Gune, The Judicial System of the Marathas, p. 89. Before starting any ordeal parties had to execute agreements in writing saying that they would abide by the decision of the ordeal. *Ibid*, p. 93.

29. *Ibid*, p 96.

30. In the self-same Masjid there was performed another lamp ordeal by Hindu litigants. These two instances of ordeals show an interesting blending of notions which are usually against the religious feelings of the Hindus and the Muslims. The Muslims generally were against ordeals and the Hindus would not usually go to a mosque for taking an ordeal. But this blending could be possible on account of the admixture of the two cultures and religions on account of the Muslim rule in India,

Usually the minor offences used to be punished by the Deshmukha and the Deshpande, whereas graver offences would be tried by the Sultan. From the time of Shivaji punishment assumed three distinct forms, to wit, Diwandaṇḍa or official punishment, Devadaṇḍa, the religious or spiritual punishment of expiation and jātidaṇḍa. During the rules of the Peshwas, however, the central criminal administration was with the Peshwa and the Chief Justice and the local criminal administration was distributed among the Sar-Subedar, the Subedar (or Mamlatdar), the Kamavisdar and the Patil. An account of Maratha criminal administration has been thus given by Robertson[31]: "Criminal justice among the Marathas was sometimes summary and sometimes dispensed only after minute investigation...........When there was doubt, it was customary for several Government servants to be ordered to sit as a court of enquiry or as jury on trial of a criminal. These men were collectively not termed as the Panchayat though their assembly had all the essential properties of one. They were always servants of the Government and never selected from the people. The culprit had no power to demand such an assembly. If the prince willed it, it sat but not otherwise. Its duty was merely to give verdict of 'guilty' or the degree of guilt, if partly guilty or of not guilty. The punishment was awarded by the prince......" The observations of Malcolm[32] also are very significant in this connection regarding the administration of criminal justice[33] by the Sardars under the Peshwas. It has been rightly said that "the Maratha[34] jurisprudence was chiefly based on the laws incorporated in the Smritis, racial customs and law of personal status, developed under the Sultans of the Deccan. The law of procedure followed and the system of ordeal and expiations formed part of the ancient laws. The rules of caste were based on racial customs while the law of status was purely the contribution of the Muslim rulers, developed out of different types of tenures as in Western countries.........During the Sultanate, the growth of the Hindu law was retarded, because it was not enforced by the public tribunals in general though referred to in cases of inheritance with the help of the Brāhmaṇasabhā. But more than three-fourths of the members of a Majlis were generally the Hindus and it seems the Majlis and especially

31. From Peshwa Daftar, Poona.

32. Central India, I, pp. 556-57.

33. Almost a similar account is given by Jenkins regarding the criminal administration by the Raja of Nagpur : "The Raja in person or the Kamvisdar administered criminal justice. Patels of villages imposed small fines, but all of any consequence were referred to the officers of Governments"..........Jenkin's Report, p. 268.

34. V. T. Gupe, The Judicial System of the Marathas, pp. 132-34.

its component part the Gotasabhā helped to preserve the ancient Hindu traditions in the law of procedure and inheritance. The Majlis served as a place for imparting knowledge of the Hindu law to the members of younger generation and Elphinstone admits that till the end of the Peshwa period 'every man was tolerably acquainted with its rules in civil cases,' even in the absence of the codified law.........After our contact with the British, these old institutions were neglected and gradually set aside. New judiciary based on the principle of English jurisprudence was adopted. From the following observation of Professor Chapekar that "it is a life-less mechanical machine"[35] it is clear that the new institutions have not been assimilated by the people[36] in this country."

3. The administration of justice during the rule of Maharaja Ranjit Singh with special reference to the elements of Hindu law contained therein

Maharaja Ranjit Singh was born in 1780, one hundred years after the death of Shivaji, in 1680. The political conditions were no doubt different to a great extent during their time ; the Muslim influence also could not have any deep and permanent effect on the South, as compared with the North. Moreover, there were many sentimental and temperamental differences between Maharaja Ranjit Singh on the one hand and Shivaji on the other. The latter, though he had the highest regard even for the religion of his enemies, avowedly strove for the revival of the Hindu culture and tradition, with the result that there was an actual renaissance of Hinduism in the South. This renaissance again was largely responsible for the negation or rather the neutralisation of the Muslim influence in Southern India. The former on the other hand was almost unmindful of and indifferent to this aspect of revival of ancient Indian culture and administration. The Maharaja was catholic and purely secular ; Persian was the language used for official correspondence and even the names of the different classes of officials in the central and the local departments were of Persian origin. Many responsible positions of the state were entrusted to the Muslims.[37] In the judicial administration of Maharaja

35. Sardesai Smarak Granth, p. 44.

36. The complicated British judicial system as it had been introduced into India will be elaborately noticed and discussed in chapter XIII.

37. Thus Ilahi Baksh and Qadir Baksh were the well-known names in the Topkhana of the Maharaja ; one branch of the artillary was even named after Ilahi Baksh. The chief police officer of Lahore usually used to be a Muslim ; Imam Bakhsh earned reputation as a Kotwal. The Qazi of Lahore also was a Muslim. One Imamuddin was the officer-in-charge

Ranjit Singh we hardly find any direct application of the original texts and commentaries on Hindu law as such, as it was to be found in the judicial administration of the Maratha kings. As a matter of fact, the judicial administration of the Maharaja was quite simple and it was hardly guided by and based upon the original provisions of the Hindu law or any other code—religious or secular. Nevertheless, some notions and principles were accepted and adhered to which could wellnigh be traced to the original institutes of Hindu law. Theft and compensation for un-recovered stolen property, ordeals, punishment[38] with branding or marking, Panchayat system, absence of court-fee and stamp, discouragement of usury, administration of justice by the Maharaja himself and amputation of limbs as punishment for heinous crimes...are some of the topics which will too readily betray their sources to have been derived from the original Hindu law at the last analysis. On these main hypotheses a brief reference may be made to the judicial administration of Maharaja Ranjit Singh in general.

As it has already been prefaced, the administration of justice during the time of Maharaja Ranjit Singh was quite simple and expedient. There was no hierarchy of courts—low or high. There was also no arrangement of appeal. There was a Chief Court at Lahore which was known as Adalat-ul-Alia. But the records do not clearly indicate as to how the judges were actually appointed, what their qualifications were, which law they were to administer and what the extent of their jurisdiction was. There were no doubt Panchayats for villages and small towns for administering civil and criminal law. According to the lights, thrown by the European writers, the Panchayats consisted of two very honest, upright

of Govindgarh one of the most important strong-holds of the Sikhs. Nuruddin was an affectionate Chief of Gulabkhana. The most highly respected Muslim of the Maharaja's time was Faqir Aziz-ud-din who was the foreign Minister and Negotiater of the Sikhs. He was also the interpreter and the confidential adviser of the Maharaja. Saints, Sufis and Ulemas, Sayyids, Shias and Sunnis—all alike received honours and distinctions in his Darbar. The Muslims were not liable to pay any additional tax on account of their religion and all people would indiscriminately take part and interest in all social and religious festivals of both the Hindus and the Muslims.

38. The forms of the punishment that have been gathered from the official records of the time of Maharaja Ranjit Singh have been enumerated thus by S. R. Kohli : (1) Dalel or extra duty, (2) Fine. (3) Reduction in pay or rank, (4) Imprisonment, (5) Kathmarna (stocks), (6) Mutilation of limbs or organs and (7) Fancy punishment, such as, blackening the face of the culprit and parading him round the town, stamping and branding the forehead and exile from his native town. (Vide Journal of Indian History (1926) P. 32).

Some forms of these punishments are to be found in the original texts of Hindu law also.

and experienced persons of high character.[39] There was no law book binding on the Panchayats regarding the substantive law or the procedural law. Cases of love, marriages, thefts, forgery and disputes relating to property were settled according to the customs of the country. But the loans or inheritance were based on precedent or old decisions. Some judicial records were available from the Kazi-khana or the law office. The witnesses used to take oath by the Holy Granth or by the holy waters of the Ganges.[40] This method of oath was also sometimes resorted to even during the British administration. Spies[41] could be engaged in tracing theft and if the foot-prints were found in a particular village, the inhabitants of that village would be responsible[42] for tracing the thief and get him arrested through the Panchayat.[43] Ordinary criminal disputes *e g.* affray were heard by the head of the local area concerned (Taulakdar) who was competent to inflict fines or corporal punishments. There was no such thing as prison, thefts and dacoities were very rare. Sometimes there were disputes regarding lands. But the Government never used to pay any great heed to such cases. The village people used to settle them either amicably or by fighting.

Sometimes the Maharaja would personally[44] adjudicate certain cases. According to some papers, dated 1891 (Vikram Era), if any person would

39. The Smritis and the Muslim rulers also insisted upon some qualifications in appointing a man as Judge or Qazi.

40. This mode of oath or s'apath was to be seen even in the Smritis in various forms. For their actual application, see ante, chapter XII......Marathi Administration of justice.

41. Similar provision was to be found in Kauṭilya's Arathas'āstra, see ante, chapter V; The Muslim rulers sometimes would personally enquire into cases incognito; vide ante, chapter X.

42. The different Smritis and the Arthas'āstra of Kauṭilya also provided that if the thief could not be detected or the stolen property recovered, the king should compensate the aggrieved person. See ante, chapters, IV to VIII.

43. For details regarding the origin, nature and function of Panchayats, see ante, chapter XI.

44. (a) Fate Sing vs Piara Ksatri: This has been recorded in some papers, dated 16th Vishakh, (Vikrama) 1891. Fateh Singh, the defendant, took a loan of Rs. 6000/- from the plaintiff Piare Ksatri. But when the money was not repaid, even after repeated demands, the plaintiff brought the case before the Maharaja who effected an amicable settlement according to which the plaintiff was to receive only Rs. 1500/-. The Maharaja asked Sardar Teja Singh, the Commander of the army, to realise the sum from the estate of Fateh Singh and get it credited to the treasury for disbursement to the plaintiff.

(b) Karam Singh vs Sadhuram Ksatri: This is another case of loan decided by the Maharaja, as recorded in some papers dated 20th Maghar, 1891 (Vikrama). In this case defendant Karam Singh took a loan of Rs. 3000/- from the plaintiff Sadhuram Ksatri. But at the intervention of the Maharaja the sum to be repaid was fixed at Rs. 1600/- only.

present any case before the Maharaja, he would sometimes hear the case and sometimes he used to send the case to be heard by the district and other responsible officers. The manner in which the Maharaja personally decided certain cases of loan indicates that action was taken on the lines of modern arbitration and conciliation Boards. The legal system was quite cheap and inexpensive. There were no such thing as court-fees[45] or stamps. When a decree was given, the rule was that 25% of the decretal amount used to be taken from the decree-holder for the government expenses. Even in theft cases, where the property was recovered, the government used to take its share in the shape of present. There were no regular jails or prisons and also no different kinds of punishment for different crimes. Generally there were fine and whipping. Sometimes people who committed heinous crimes or who were habitual offenders, had some of their limbs, such as, hands, ears, legs or nose amputated. There is no indication from the records that there was capital punishment. It appears from certain records that the Maharaja severely reprimanded some of his Governors and indicated his disapproval because some criminals were put to death[46]

From the illustrations given above, it is abundantly clear that the judicial administration of Maharaja Ranjit Singh[47] also was to some extent indebted to the original texts of Hindu law from which some notions and principles were accepted consciously or unconsciously and expressly or impliedly. The actual application of the original Hindu law even during comparatively recent times covering the 17th, 18th and a part of the 19th century most unmistakably indicates the continuity of the pure Hindu law which originated several centuries before the birth of Christ.

4. Some Sanskrit judgments or jayaptras of the 17th and the 18th centuries

References will be made to some Sanskrit judgments or jayapatras which will clearly mean an independent and unmistakable evidence of the

45. For details regarding the history and amount of court-fee in ancient and modern India, in modern China and in the administration of justice in Maharastra, vide supra, chapter XIII.

46 The Smriti texts provided for capital punishment ; the Arthas'āstra of Kauṭilya also makes such provision. Vide ante, pp. 201-202.

47. Subject to the influence of Hindu law, the administration of justice by Maharaja Ranjit Singh was primitive and archaic ; nevertheless, the system substanially served the ends of the then society. As a matter of fact when the Britishers introduced the elaborate judicial system of the West, the people showed their disapproval. (Vide Maharaja Ranjit Singh, written by Sita Ram Kohli in Punjabi, pp- 218 *et seq*).

fact that the Hindu law, as enshrined in the original texts and commentaries, was invariably used in actual practice and also that inspite of various vicissitudes—both political and social—the tradition thereof was brought down to quite recent times to have been modified by the judicial system, as introduced during the British administration: "No unbiased student of the Smriti literature," observes an eminent Indian jurist,[48] "can assert that the system whose begining and development are traceable from stage to stage was wholly imaginary or ideal. The rules laid down are so detailed and practical and their development is so natural that they must have been the result of actual experience in the daily administration of justice......Why should they all have indulged in the pastime of writing about a system of judicial administration which never existed? The jayapatras of Darbhanga and Java referred to by Mr. Jayaswal and Professor Jolly afford proof that the directions contained in the Smritis as to the forms of judgments were in fact being followed." According to Dr. Ludwik Sternback[49] also "the non-juridical sources in classical Sanskrit mirror many legal provisions relating to the contracts of deposit, as included in the Smritis and even complete them, particularly as to the ownership or detention of the objects deposited, vis major, *integrum restitutio* of the objects deposited, denial or restoration of the objects deposited etc. This shows that the rules contained in the Smritis and relating to the contracts of deposit were living rules that were well-known to the general public."

5. The Jayapatra in the case of

Tularam Sarman with cosharers . ... Plaintiffs

vs

Maninatha Sarman... ... Defendant.

This is a unique document throwing an inexhaustible flood of light on the actual working of the Hindu law of the original texts and the

48. S. Varadachariar, Ju'ge, Federal Court, India—The Hindu Judicial System, pp. 231-32.

49. Juridical Studies in Ancient Indian law. The author contributed 19 valuable articles on the above subject, vide Journal of the American Oriental Society, Vols. 72 and 73 (1952-53).

Concluding his article No. 19, Dr. Sternback further holds that "despite general rules determining the accurate usage of terminology in the Alaṃkāras, the non-juridical sources in classical Sarskrit Instead of using technical legal terminology found in the Smritis and Bhāṣyas, employed for the designation of open deposit (nikṣepa), sealed deposit (upanidhi), secret deposits (nyāsa), mutual deposits (pratinyāsa), deposits for use (yācita) and deposits for delivery (anvāhita) colloquial terms, such as, nyāsa or nikṣepa, although the non-juridical sources show that the contracts of deposit narrated there were not the contracts which were described by the colloquial terms used."

commentaries. This document has been fully examined by Dr. K. P. Jayaswal in the Journal of the Bihar and Orissa Research Society.[50] In the words of Dr. Jayaswal, "every line of the above judgment is referrable to Hindu law texts" and he "realised for the first time[51] how a Hindu judgment was written, how the Sabhā of the Hindu judges endorsed that judgment and how stiff, severe and dignified, technical, methodical and scrupulously formal a Hindu judgment used to be." The said jayapatra was obtained by Pandit Vishnu Lal Jha from the house of Mathura Nath Jha of the village Dharampura near Jhanjharpur in the district of Darbhanga. This Mathura Nath was a descendant of Rupanatha Thakkura who has been mentioned as one of the forefathers of the defendant Maninatha Sharman in the judgment itself. The judgment was written and signed by Sacala Miśra[52] who was evidently the Prād-vivāk or the Chief Justice. It was also signed by the puisne judges[53] or the members of the council sideways at the top of the jayapatra indicating their concurrence therein. The judgment corresponds to the English date 10-6-1794, which is almost the end of the period of the so-called Indo-Moslim system which had largely been affected by British system of law. It is immensely interesting to note that "the judgment is thus one of the very last products[54] of the Hindu court. The tradition found in the judgment had come

50. *Ibid*, 1920, pp. 248-58.

51. *Ibid*.

52. (Cf. Fifth Report, pp. 452-53; private lands "Milkeeut of Raja Madho Singh, p. 468).

53. Dr. Jayaswal doubts whether the signatories in the jayapatra were members of the Bench or the Jury. If we take into consideration the significance of the epithets "Gatamatsarān dharmādhyakṣān and paṇḍitān" we may be inclined to think that the members referred to in the jayapatra were members rather of the Bench than of the Jury sabhā. This is also supported by Dr. Jolly (see supra). According to the text books on Hindu law, as Mitra Mis'ra, the author of the Vīramitrodaya, says, the sabhā should consist of 7, 5 or 3 members the odd number having been laid down to secure the majority in case of difference of opinion." But from this it does not necessarily follow that there cannot be an odd number of puisne judges on the Bench. For the respective functions of the different members of the judicial council, vide Mitra Mis'ra, pp. 41-42.

54. The dates of the jayapatra and its discovery are very important. The judgment bears a date that corresponds to the 10th of June 1794 A.D. In 1918, Pandit Vishnu Lal Jha, brought the judgment at the annual meeting of the B O Research Society. The judgment was written in Maithili script. Hence there could not be any doubt that it was written in Mithila. The above dates are very significant to indicate the continuation of the Hindu tradition based on the original texts and commentaries upto the close of the 18th century when the East India Company was quite firmly established in the country. The discovery was quite in keeping with the view of Dr. Jayaswal that "the Hindu traditional administration came down in Mithila even in the Muhammedan centuries," This was also corrborated by Mr. O'Malley. (District Gazette, Darbhanga, p. 17).

down from the famous Kāmeśvara dynasty to whose possession and power or pricipality, the Rajas of Tirhut of the house of Mahesh Thakur succeeded according to the Privy Council decision (6 M.I.A. 189)............ It is due to the peculiar culture of Mithila since the time of Janaka that we owe this longivity of Hindu administration of Hindu law and that legal history owes this precious gift of Hindu judgment." The jayapatra referred to above is a typical Sanskrit judgment[55] complete, comprehensive, fully in consonance with the provision of the Hindu law and wholly preserved in its content. Brihaspati[56] defines a jayapatra or a document of victory as one wherein "whatever has been transacted in a suit, the plaint, the answer and so forth as well as the gist of the trial should be noted." The contents of a modern judgment[57] also are almost identical. The jayapatra in question may be summarised as follows: The plaintiffs in this case are Tulāram Śarman and his several co-sharers Balli Śarman, Jānakī Śarman and others while the defendant is one Mani Nāth Śarman. The dispute was with respect to the right over a slave woman Saito by name who was the daughter of the slave Mati. The plaintiffs claimed Saito to be restored to them by the defendant. This was the plaint. But the defendant's reply or written statement was that Saito was in his possession with her children, but that he did not know her status or how she had happened to belong to his family. This reply was a denial (Mithyottara); so the onus of proof lay on the plaintiffs according to the dictum of Vyāsa, who holds that in case of plea of former judgment (Prāṅ nyāya, *Res judicata*) or a special plea the defendant has to prove his case, in a plea of denial, the plaintiff has to prove his case, in confession or admission, proof is not required at all. Then Tulārām proposed to prove the fact of Saito's being the daughter of the

55 No other Sanskrit judgment had ever been discovered before ; of course, there were "instances of examination of the accused, examination of a witness and even arguments by advocates which the commentator Asahaya has preserved in the casual report of a case tried in the court of Pataliputra" (For the facts of the case and the law points decided therein see Mahidhara V Sridhara, Sacred Book of the East, Vol. XXXIII, pp. 43–44 ; the main point of law involved was the question of liability for debt. Cf. also the note of Dr. Jayaswal, Calcutta Law Journal, 1913, XVII, p. 59. n.)

56. VI, 3.

57. Vide Section 367 Cr. P.C.

According to the Civil Procedure Code, "judgment means the statement given by the judge of the grounds of a decree or order." For the definition of decree and order see section 2 ( ) and section 2 (14) of the C.P.C.

slave father Mati. To this the defendant Mani Natha objected by saying that it would be immaterial, as the fallacy of begging the question would be involved in this process of argument. Thereafter the plaintiff Tulārām wanted to prove that Saito's mother Yādo was his female slave. To this the defendant agreeing, the plaintiff was allowed an adjournment for a fortnight. After adjournment when the plaintiff Tulārām appeared before the court, he proposed to prove that in the Mahomedan year of 1158, 43 years before the claim in suit, with the help of Ganādhīpa Dīpacanda and Ram Baksh, the slave woman Saito was forcively taken to his village where she was employed for slave work for three months. To this the reply of the defendant was that force was no proof and that carrying Saito by force did not prove anything. The plaintiff Tulārām had no documentary evidence ; so he wanted another adjournment to prove his case through his own slave Bajahā. But the plaintiff did not turn up even after two months ; and when he was made to appear before the court, the defendant declined to accept the evidence of a single witness who was only half the age of the controversy. The Chief Justice accepts this objection of the defendant on the injunctions of Śankha and Brihaspati who hold that two priests shall be accepted as witnesses, but a single witness shall in no case be examined. After this the plaintiff Tulārām Śarman wanted to prove his case by ordeals (extra-ordinary proof) as there was no other ordinary or secular testimony. To this also there was an objection on the part of the defendant who asserted that no ordeal could be accepted in face of his possession extending over hundred years and four generations, to wit, Madhu Sudan Thakkur, Rūpnāth Thakkur, Mani Nātha Śarma and Prāṇa Nāth Śarma without any voice being raised on the part of the plaintiffs and without any interruption particularly in view of the fact that the plaintiffs were quite close to the defendants. If an ordeal was to be acceptable in the present case then why not the same principle be applicable in a case where possession had been one of thousand years without any oral or documentary evidence ? The strong reply was accepted by the Chief Justice and his companion judges on the authorities of Kātyāyana whose aphorism runs thus : "Witness is stronger than inference ; document is stronger than witness and uninterrupted possession for three generations is stronger than these." It was thus ruled by the Chief Justice and others of the council that they were of opinion that really texts of "thief etc" attributed to Nārada have application where an enjoyment of possession by the man in possession is only for a short period. How could it be otherwise ? Thus in absence of secular proof in matters of immovable property, the

application of ordeals has been negatived by the text of Pitāmaha which has been commented upon by Harinātha Upādhyāya, Misaru Miśra and other commentators. The relevant text in this connection runs thus: "In disputes over immovables, ordeals should not be resorted to; the decision should be arrived at with the help of witnesses, documents and possession." Thus the plaintiff was not allowed to take recourse to prove his claim over the slave woman Saito by means of an ordeal with the result that the plaintiff was unsuited and had to lose the cause. The document of victory (Jayapatra) was given in favour of the defendant Mani Nātha who proved possession for more than one hundred years—a condition which is legally necessary to prove to establish a claim of right over a cheti or a slave woman.

After these arguments, reasonings and rulings, the Chief Justice addressed this decree or order to the other sabhyas to signify their consent as impartial, learned and virtuous judges. The jayapatra was signed and dated by the Chief Justice, Sacala Miśra and the other judges signified their concurrence by signing their name sideways at the top of the judgment; before putting their signatures each one wrote that he was concurring with the Chief Justice. The puisne judges were seven in number, namely, Kalānātha, Ratnapati, Bhabanātha, Mathurā Nātha, Umānātha, Bacha and Ṣaḍāṇaneśvara. From the above summary of the contents, it will readily appear that the jayapatra in question was well-reasoned, impartial, exhaustive and strictly based on the principles of Hindu law, as derived from the authoritative texts and the commentaries. The language of the judgment also is very chaste, precise and indicative of the ability and learning of the Chief Justice who was responsible for the determination of the issues involved. Many legal terms in their technical sense have been readily used and references have been frequently made to the relevant texts and authorities. The judgment also most faithfully reflects the different stages of the litigation and the various parts played by the parties. The Chief Justice has evinced an admirable aptitude for applying the general principles of Hindu jurisprudence to a concrete case.

At the very outset, the judgment begins with the description of the parties and their respective pleadings—Bhāṣā and Uttara. The next point is the onus of proof which was determined with reference to the text of Vyāsa[58]: "Prāṅnyāya kāraṇoktau tu pratyarthī sādhayet kriyāṃ.

58. Vide Nārada, III, 8; Sacred Book of the East Series, XXXIII, 241 (Jolly): "In case of denial, the burden of proof rests with the plaintiff; in case of special plea, (it rests) with the defendant.........What the claimant has fully declared word for word in the plaint

Mithyottare pūrvavādī pratipattau na sā bhavediti." After an unsuccessful attempt on the part of the plaintiff to prove his claim, two adjournments were allowed by the court. The first adjournment was for 15 days. The second adjournment was obtained to prove the case through a slave of his own named Vajahā. After this adjournment the plaintiff would not turn up before the court again for more than two months and when he was ultimately produced before the court after strenuous efforts, he wanted to prove his claim with the help of a single witness to which the defendant objected.[59] The most learned discussion was made by the court when the plaintiff wanted to prove his case by ordeal or extra-ordinary evidence, as there was no secular or ordinary proof in this case. To this also the defendant objected.[60] It was very nicely argued by the Chief Justice—bhuktavastuviṣayatvam teṣām vacanānāmiti samyak pratimakathamanyathā sāgamamatrā bhogupramāṇye[61] pramāṇaparthakyena bhoga prāmāṇyamunayaḥ[62] Nibandhakārāścodājahruḥ." Relying upon the above texts of the sage Pitāmaha and the commentators like Harināthopādhyāya and Misaru Miśra[63] the Chief Justice decided that the plaintiffs were to lose the case and hence the jayapatra was given in favour of the defendant Maninātha who would be regarded as entitled to the possession of the slave woman[64] Saito. Regarding the interpretation of the

that he must substantiate by adducing evidence......when the defendant has evaded the plaint by means of a special plea, it becomes incumbent on him to prove his assertion and he is placed in the position of a claimant. In the plea of former judgment all that is required in the shape of proof is to produce the previous decree." See *Ibid*, p. 242.

In view of the above texts, the plaintiff was asked to adduce evidence to prove his claim. In this connection the plaintiff was going to prove the slave status of Saito, by reference to her being the daughter of the slave Mati.

59. The objection based on the following texts of S'ankha and Brihaspati was allowed by the court "Ubhau tu s'rotriyau grāhyau naikaṃ pricchet kadācaneti."

60. The argument adduced by the defendant Mani Nātha clearly appealed to the Chief Justice and his companion judges and was accepted by them on the text of Kātyāyana.

61. Hence ordeals are to be avoided in face of long possession over three generations.

62. For the subject of prescription and prohibition, see Yājñavalkya, II, 22-25, 27-29, as quoted by Aparārka. For comparison and contrast between ancient Hindu law and ancient Roman Law on the point of prescription and adverse possession, see chapter I, ante; also for the relative importance and selective application, see *Ibid*.

63. Both of them were celebrated writers of Mithila and were quoted by Caṇḍes'vara, the Law Minister of Haradeva Sinha, king of Tirhut and Nepal who was a contemporary of Tughlak Shah according to Dr. K. P. Jayaswal.

64. References to various kinds of slaves were made by the different text writers—specially by the later Smriti writers. That slavery was actually in existence in the Indian society is abundantly proved by several documents which were concerned about transfers of slaves. Pandit Vishnu Lal Jha, who was responsible for the discovery of

expression of the "Gaurī vātikā or (gaurī vacātikā) occurring in the above jayapatra from Darbhanga, some difficulties were experienced by both Dr. K. P. Jayaswal and Dr. G. N. Jha. In course of his translating the judgment, Dr Jayaswal remarked that the text of the expression was not clear to him ; the text seemed to have been corrupt. He was also not sure if the reasoning which followed had been fully brought out in his translation.[65] The defendant contended that the proposition of the plaintiff was vitiated by the fallacy known as "Asādhāraṇa anaikāntika." Dr. G. N Jha on the other hand makes the following observations[66] with respect to the above expression in the judgment: "On the outer cover of the plam-leaf MS in my possession I have found a document more than 300 years old which is a deed of sale pertaining to a slave. In this document the deed is referred to as "gaurīvacatikāpatram." From this[67] it would seem as if "gauricā (or vā) tikā" were a technical term referring to slavery or service, so that the expression in the judgment may be taken to mean, "who is fit for being received as a slave or a servant" or more probably "who is fit for being emancipated from slavery."

In a rejoinder to the above observation of Dr. Jha, Dr. Jayaswal says that "the unexplained passage on which Dr. Jha kindly writes is guarīvatika as the expression has been found in two short documents discovered recently by Pandita V. L. Jha in the Raj Library at Darbhanga. They are dated in the Lakshmana Sen era 528, 549. In the latter

the Sanskrit jayapatra from Dharbhanga was also credited with the discovery of many Sanskrit title-deeds in respect of the sale and purchase of slaves. For slavery see Yājñavalkya, II 182-183, as quoted by Aparārka : "The mother of a domestic slave must be a slave woman, according to Aparārka. A slave girl attained freedom when the master had carnal connection with her and had a child born "

65. The relevant portion of the judgment containing the 'unexplained expression' was translated thus by Dr. Jayaswal : ' Now Tulārām S'arman proposed to prove the fact of her being daughter of the slave father (Mati). Thereupon the defendant Mani Nātha S'arman replied that it would be immaterial on accounnt of the fallacy of not proving the slave status of a slave's daughter (.........) that if it were alleged that the absence of evidence of general factor of the status of a slave's daughter. The fact of her being the daughter of Mati Dāsa should be taken to be that evidence, it would be begging the question, for the point of Mati's daughterhood was the hypothesis."

66. JBORS, (1920), pp. 121-122.

67. The text of the document is a mixture of Sanskrit and Maithili. Thus regarding the particulars of the document in question it has been cited that "in the Saka year 1537 (1615) A.D. on the fourth day of the bright half of the month of Vais'ākha, Friday, S'ri Ramabhadra S'arma makes over this deed of sale relating to slavery (or deed of emancipation) to S'ri Kagalā Das......" See *Ibid.*

of the two documents a passage occurs in Maithilī, as in Dr. Jha's document. Both documents are deeds of transfer of slave girls. The slave girl in each case was bought evidently to be married to the slave of the purchaser. The document is called a deed of "gaurīvavāṭikāpatra," drawn by the old master in favour of the new one giving up all his right, title and interest in the slave.

All the three documents—the two given here and the one set forth in Dr. Jha's note show that the slave girl had been a virgin at the time of the transfer. The expression commencing with gaurī (virgin) may have something to do with the unmarried status of the slave. A slave girl became free when she was married to the master (according to Aparārka). Here in one case, we find her being married to the son of the master. The literal significance of the expression is still unascertained."[68]

From their views, quoted above *in extenso*, it appears that none of the learned scholars was evidently sure about the reading and consequently about the literal connotation of the relevant expression. A reading could be hazarded as this : "gaurīceṭikā" in the jayapatra and "gaurīceṭikāpatram" in the other documents. There is no difficulty or confusion regarding the words gaurī and patram. The only difficulty is with respect to the intermediate terms as vacāṭikā or vavāṭikā. The reasons for inclination to this reading may be enumerated thus :

In the first place, it appears that all the documents in question deal with transactions concerning certain female slaves. The word gaurī might mean, as it has been suggested by Dr. Jayaswal, that the female slaves in question were unmarried or virgin. Hence the expression "gaurī ceṭikāpatram" meant a general name applicable to a category of documents dealing with maiden slaves, whatever might be the purpose of the execution of the documents—whether for transferring the female slaves to be employed as slaves, or to be married to the purchaser's slave or even to be married to the master or his son[69] or any other relation.

In the second place, there are admittedly some corruptions and differences in the readings of the expression, as they appear in the different documents under discussion.

In the third place, the arguments or the reasonings in the jayapatra (of Darbhanga) are invariably lucid and rational being entirely based on

68. *Ibid.*

69. See the last portion of the quotation from Dr. Jayaswal, above.

the provisions of Hindu law, as embodied in the original texts and the commentaries. The reasoning of the Chief Justice also is immediately based on the texts of Aparārka according to which the mother of a slave girl must be a slave and also that a slave girl attains freedom when the master has carnal connection with her and has a child born. Dr. Jayaswal does not appear to have noticed the significance of the term" "vyabhicāritvena" in the jayapatra.

In the fourth place, the substance of the objection of the defendant was that the mere fact that the girl slave was the daughter of a slave did not in itself form the slave status of the girl herself—who also impliedly in her maiden state might as well become free by carnal connection with her master. It is only on this hypothesis that the meanings assigned by Dr. Jha to the expression as "who is fit for being received as a slave or servant" or "who is fit for being emancipated from slavery" could to some extent be acceptable. According to this contention, the slave girl could be received for any purpose[70] including her marriage with the new master in which case the slave girl would be automatically emancipated.

In the fifth place, the reading and interpretation will reconcile the views of Dr. Jha and Dr. Jayaswal specially in view of the connotations of the term "gaurī" and "vyabhicāra."

Lastly this reading and interpretation will be more in consistence with what follows[71] the relevant expression and portion of the jayapatra.

6. The Javanese jayapatra in the case of Dharma V Pu Jabwel

This Javanese jayapatra[72] has many close points of resemblance with the Indian jayapatra (from Darbhanga), referred to above, both with respect to substantive and adjective laws, derivable from the original texts and commentaries of Hindu law though, as a matter of fact, they were widely

70. Though there is no clear mention as to what would happen to the slave status of a girl after her marriage with the son of the master, yet it might follow as a corollary from the contention of Aparārka that the slave girl would thereby become emancipated. (Vide the observations of Dr. Jayaswal, quoted above).

71. As a matter of fact, as soon as the proposition of the plaintiff was found to be fallacious, he at once wanted to prove the slave status of the mother of Saito who was named Yādo.

72. "It was couched in ancient Javanese and written on a copper plate being extant in the distant island of Java. This Javanese jayapatra has been described in an apparently forgotten Dutch paper by Dr. J. Brandes (Een Jayapatra of Act Van eene Rechterligke Uitspraak Van Saka 849 Wettereden 1887). Vide JBORS, (1921) p. 117. Dr. Jolly.

separated by time and place. The Indian judgment was written in 1794 A.D., whereas the Javanese judgment was written in 928 A.D., the interval being of 866 years. This is another unmistakable evidence that even in the 10th century A.D., the Hindu law of the orthodox tradition was in actual application not only within the bounds of India but even outside.

The facts that were involved in the said judgment were that Campa, the deceased wife of Pu Jabwel, the defendant, borrowed a sum of money (amounting to one suvarṇa in gold) from Dharma[73], the plaintiff, who happened to be her relation also. The case was started against the husband, though the money was actually borrowed by the wife. The jayapatra was, however, given in favour of the defendant on account of the facts that the plaintiff failed to appear[74] before the court on the day fixed for hearing, that the money was borrowed by the deceased wife without the knowlege of the husband and also that the wife died without any child of her womb by him. Several witnesses appear to have been examined. The jayapatra contained the name of its writer and towards the end of the jayapatra there is a statement that it is final and irrevocable. Dr. Jolly has instituted a very instructive comparison between the Indian and the Javanese jayapatras in the following words : "Although the Javanese jayapatra is much shorter than the Indian one and does not contain any reference to the authoritative law books or discussion of legal questions, the two documents resemble each other in several important particulars. Thus the Indian jayapatra refers to the fact of the plaintiff's having made default though he had been called by the defendant several times. He only came subsequently after great exertions, when a fresh trial had commenced. The Javanese document mentions the non-appearance of the plaintiff as reason for his being non-suited. Again the seven signatories at the top corners, as Pārshads or members of the Bench express their concurrence in the judgment, because it is in the hand writing of and signed by the Chief Justice himself. The title of jayapatra or declaration of success is found at the close of both documents. Other features of the Javanese jayapatra though not common to it with the Indian one, may be traced to the rulings of the Sanskrit law books."[75]

73. This apparently seems to be a Sanskrit name.

74. In the Indian jayapatra also there is mention of re-hearing as the case was once decided on account of non-appearance of the plaintiff.

75. Dr. Jolly, JBORS, (1921), pp. 118-20. For the rules regarding default of appearance and the character of jayapatra, vide Narada, (I, 2,32) ; Aparārka, (II, 84) ; Bṛihaspati, (VI, 3) and also Bṛiddha Vasiṣṭha.

7. The caste-judgment given by king Śambhūji, son of Shivāji (A.D. 1675)

In the present case the judgment in question is some what different from the judgments, referred to in the preceding pages. The preceding judgments were announced by legally constituted courts in the course of actual administration of justice involving two definite parties. But in the instant case, it was not an adjudication by a court in an actual litigation. It includes a ruling given by the king Śambhūji regarding the rights and duties of the people of the Kāyastha caste. Nevertheless this judgment also has got its own significance. In the first place, as caste-system played a very conspicuous role in Hindu law, any determination of a caste question is sure to involve atleast some aspects of legal consideration. The Hindu society in its entirety was based upon the question of Varṇa or caste and Āśrama. In the second place, this caste judgment indicates that the social and legal administrations of the time were regulated mainly by the provision of Hindu law, as embodied in the different texts and commentaries. This fact will go to corroborate very substantially the proposition that the original texts of the Hindu scriptures were actually binding upon and applicable to the people for their day to day administrarion and governance. The truth of these assertions can be very well seen from the views which were supposed to have been expressed by Shivāji and his son Śambhūji themselves in connection with the present judgment. Thus Shivāji clearly instructed Bālāji who was a Kāyastha to celebrate the function of Upanayana only if sanctioned and permitted by Śambhūji, as "otherwise there must be some troubles," obviously on account of the non-observance of some Śāstric injunctions. Much more emphatic was the assertion of Śambhūji on this point, as he could not even conceive the thread ceremony of a Kāyastha during the rule of Shivāji who was most scrupulously following the Hindu rules and traditions.[76]

The occasion of this caste judgment[77] was when Bālāji Prabhu[78],

76. See "Some verses about the Kāyastha-Parabhus composed by Kes'ava Paṇḍita by the order of the king S'ambhūji, son of Shivāji...C.A.D. 1675," written by P. K. Gode, in the Annals of the Bhāndārkar Oriental Research Institute, Vol. XX, pp. 235-248.

77. It consists of 33 verses. But there is another copy of this judgment under the name of "Parabhu Kathā," as to be found in the Bhārat Itihāsa Saṃs'odhaka Maṇḍala, Poona, consising only of 29 verses. The first two verses in a different metre were composed to eulogise the king Shivāji and S'ambhūji.

78. Asitpañcavaṭe ramye nagare S'iva nirmite.
Bālāji Prabhū kas'citkāyastho nṛipalekhakaḥ
Yatputra Khaṇḍanāmāsīt kartūṃ tasyopanayanaṃ
Matiṃkritvās'ivaṃ praṣṭum Bālāji Prabhūrāgataḥ

a Kāyastha scribe of the king, wanted to perform the sacred thread ceremony of his son Khaṇḍa and for that purpose he approached Shivāji to seek his opinion and invite him to his place along with his Ministers. The ceremony was to be performed on the following day. Shivāji asked Bālāji to consult Śambhūji, his son, on this matter. Accordingly, the scribe approached Śambhūji also with similar prayer for permission and intention to invite. Thereupon the king Śambhūji who was religious and versed in the Śāstras explained to the scribe that there was no provision in the Śāstras for the upanayana ceremony of the Kāyastha. That ceremony was meant exclusively for the twice-born classes, that is, the Brahmins, the Kṣatriyas and the Vaiśyas. He also corroborated his assertion by referring to the details of the ceremony, as meant for the three higher classes alone and he concluded by saying that in absence of provisions in the Śāstras, he would not advise or allow the performance of the desired ceremony.

After having given his adverse opinion to Bālāji, the king Śambhūji re-iterated his conclusion to the learned Paṇḍits[79] of his own council emphasising, at the same time, its infallible character. The king was not even slow to enumerate certain characteristics of the Kāyasthas which would at once indicate their inferiority[80] to other castes, such as, the Dvijas. Hearing the decision of the king Śambhūji, Bālāji was naturally disappointed and depressed with the result that all the relations who had assembled for the proposed upanayana ceremony had to disperse[81] with heavy

Baddhāñjaliḥ nripasyāgre sthitā kāryam nyavedayat
Khaṇḍanāmno hyupanayaḥ kriyate s'vo mayā prabho
Dāse mayi dayām kritvā gantavyam mantribhiḥ saha
Iti s'rutvā s'ivo bhūpaḥ pratyuvāca mahāmatiḥ
(Verse Nos. 3-6).

79. "Tataḥ provāca matimān S'ambhū Bhūpo Mahāyasāḥ
S'rotavyaḥ paṇḍitaiḥ sarvaireṣāṃ dharmaḥ sanātanaḥ
Ete saṃkarakāyasthāḥ pañcasaṃskārasamskritāḥ
Namomantrenaiva coktaṃ karmaiṣām kriyate dvijaiḥ

80. "Māṃṣāsanāḥ surāpānā nirdayā lokapīḍakāḥ
Dalbhyaikagotrenānyonyam vivahaḥ kriyate khilaiḥ
Punarbhavāṃ vivāhās'ca pātakhyaḥ sarvasammataḥ
Prasutāyā api punarjāyate nātra saṃs'ayaḥ
Ayam Rāmaji Parabhu vartate mama sevakaḥ
Etasya bhaginī cāsti dvitrivārṃ vivāhitā
S'ūdrā api jalaṃ naiva pibatyeṣāṃ gṛihe kvacit
Evaṃ sanātana dharmaḥ kāyasthānām pradris'yate"

(A very curious derivation of the word Kāyastha has been given in verse Nos 22-23 attributed to Ūs'anas).

81. "Yototidukhitaḥ sarvān Maunjībandharthāgatān
Visasarja suhridvargān nābbūn Maunjijutaḥs'is'uḥ."

hearts. The judgment and the reasons were versified by Keṣava Paṇḍita[82] at the instance of the king Śambhūji in 1675 A.D.

8. Śyenavijātidharmanirṇaya of the time of Shivāji

Another Sanskrit judgment was discovered in the Sanskrit Pāṭhśālā of Rājāpur. This was also not a strictly legal adjudication announced by any court of law ; but it was a decision given by a board of Paṇḍits under order of Shivāji. The decision was in respect of the rights and duties of the Brahmins of Konkan where they belonged to and were known as Śyenavijāti. In this judgment also we find the application of the rules of Hindu law texts and commentaries. Moreover it reflects the condition of the then society with special reference to the Brahmins of the Śyenavijāti. The judgment in question has been published in the Annals of the Bhārat Itihāsa Saṃśodhaka Maṇḍala,[83] Poona. According to Sir J. N. Sarkar this judgment was given by a Council of Paṇḍits under the order of Shivāji at Rajapur (Ratangiri District, Bombay).[84] It begins with the eulogy of Shivāji and his father.

The occasion of the judgment also has been described ; when Shivāji noticed peculiar manners and functions of these Brahmins, he became curious to know their rights and duties according to the Hindu religion and the Hindu law.

82. That Kes'ava Paṇḍita was the author of the verses is corroborated also by the colophon added after the last verse (No. 33) in the MS. of the Parabhūprakaraṇa to be found in the Bhandārkar Oriental Research Institute. This Kes'ava Paṇḍita was also the author of the Rājarām Carita (edited by Mr. V. S. Bendre) and the Daṇḍanītiprakaraṇa which were composed in 1690 and 1682 respectively. The Daṇḍaprakaraṇa was based on the Dharmas'astras and the commentaries.

83. Of the S'aka era 1835 corresponding to 1913 A D. See pp. 293-305. It has been said in the Marathi introduction of the judgment that "for the knowledge of the social and religious history of Shivāji's period, we must search for the decisions on the above two matters. They can be found with the old S'āstri and Paṇḍit families. Such a decision is being presented here. It was found in the Sanskrit Paṭhs'ālā of Rajapur. This will help research scholars to find out more of a similar type.........After the end of the 7th verse, a peculiarity of the administration of Shivāji has been cited which will excite in everybody's mind a number of thoughts........."

In the colophon, it has been given that this decision about the S'yenavi caste was transcribed by one Raghunath Krishna Patnākar in S'aka 1734, Ashwina, Sudha 9, Mandawar, from a manuscript in the possession of Mahadeobhūbhaṭṭa Navare. This translation was made at my request by Mr. G. H. Khare, Curator, Bhārata Itihāsa Saṃs'odhaka Maṇḍala, Poona.

84. On the rights of the Sārasvat Brahmins it was given by a Board of Paṇḍits including Paramānand under order of Shivāji at Rājāpur, (Ratanpur District, Bombay) in 1664. The copy of the Annals containing the judgment was obtained from the Bhārat Itihāsa Saṃs'odhaka Māṇḍala, Poona.

A very useful list of the Paṇḍits of different places also was given ; it was these Paṇḍits who sat in a council and gave the decision to satisfy the curiosity of Shivāji who wanted to know the "Dharma" of the said Brahmins.

Still more important is the enumeration of the books that were consulted by this council of learned persons......"granthānādāya bhūrśaḥ." These books naturally enough included the different texts on Dharmaśāstra and the different commentaries written by different authors of different time and place. This itself goes to prove that the texts and the commentaries on Hindu law were not idle speculations, but that they were meant for actual application[85] in the matter of administration and governance of the society. Another fact that is corroborated by the enumeration of the different works on Hindu law and religion is the never failing enthusiasm of Shivāji to have his administration absolutely based upon the Hindu religion, customs and traditions. The enumeration of the different representative works will at once show its comprehensive character.

The decision which was arrived at by the assembly of the learned scholars was that the Brahmins of the Śyenavijāti[86] also were Brahmins though they were forced to accept some inferior or unusual occupations on account of pressure of circumstances.

Besides the judgments, referred to above, V.T. Gune[87] has enumerated and quoted several judicial documents numbering about 616 in all

85. The enumeration was made at the time ef Shivāji. Hence it is more important than any enumeration made by any ancient author of Hindu scriptural literature--showing the continuity of the Hindu texts and traditions even upto more recent times.

86. The whole range of literature on Hindu religion and culture was ransacked and the rights and duties of the Brahmins were discussed at length. If the Brahmins are compelled to do some work or adopt a mode of living not strictly according to the provision of the Ś'āstras, still their degradation will not be enough to exclude them from the class of Brahmins. Reference was made to the Padma Purāṇa.

There is a story in that Purāṇa according to which in ancient time there was a king named Sudhumna who died leaving his sons behind. The sons quarrelled so bitterly among themselves that there was no administration in the kingdom. There was anarchy every where. People forgot their duties and religion. There were draught and famine also. People began to eat prohibited foods and were scattered in different parts of the kingdom in search of food ; ultimately when Gods also were not getting any oblation, they approached Viṣṇu at whose instance a virtuous king was enthroned and peace and prosperity were restored. The Brahmins also re-assembled from different parts of the country and re-adjusted their duties and occupation according to ācāra, tradition and local conditions.

87. The Judical System of the Marathas, PP. XVI, XVII and Appendix A and Appendix B.

including "decisions and orders regarding punishments both royal and social or religious. They also include a few chits about expiations...... Of the 616 documents 310 deal with civil suits, some of them are styled as Mahzars while others are named as Nivādpatras or Watanpatras......of them 105 are Mahzars and 205 are Nivādpatras, but they contain only summaries of these recorded in the Rojkirds (diaries) of Shahu and the Peshwas while granting the original Nivādpatras or Watanpatrās to the party in whose favour the suit was decided. They are selected from the Peshwa Daptar, Poona and all of them belong to the later part of the 18th century.........A Mahzar[88] can be divided into two parts : the one representing the Majlis in whose presence the award is passed and the other dealing with its subject. The former records in detail the place of Majlis, the members of the Majlis from the Diwan and Gota according to their respective designations, native places and seals ; while the latter confines itself to the subject proper and the nature of the subject determines its form."

88. "The length of a Mahzar varies from 3 to 15 feet and breadth from 4 to 6 inches. It is prepared by fixing together short pieces of hand-made paper and the joints are marked with seals on the back and sometimes blackbrown"......*Ibid*, p. 135.

BOOK IV

British Period and After (from 1772..........)

CHAPTER XIII

Introduction of the British System of Administration of Justice into India and its effect on the Development of Hindu Legal History.

1. Some preliminary observations

As it has already been seen, with the advent of the Muslims and the consolidation of the Muslim rule in India, the natural growth of Hindu law was considerably arrested, in the sense that it practically ceased to be administered by the Muslim royal courts. The criminal law was administered by the Muslim rulers through the different courts, presided over either by the rulers themselves or by the Judges or the Qazis, appointed by them. The Muslim criminal law was equally applicable to the Hindus and the Muslims alike without any distinction of caste or creed or rank or position. The civil law of the Hindus, as derived from the earliest sources, was mostly administered by their caste-courts or Panchayats, constituted by their own people. But the Muslim civil law, based as it was on the Koran or the Shara' was not entirely beyond the recognition of the Muslim royal courts. The distinction was essentially based on the question of religion. So, after the introduction of the Muslim criminal administration, the original Hindu system of crimes and punishment, the conception of sins and prāyaścitta came to be suppressed; of course, the religious theories did not absolutely die out. The conception of crimes and sins to be expiated, to some extent by prayaścitta and other religious rites, were confined to their private sanctions which were never the subject-matter of the Muslim rulers or their courts. The immediate effect of the Muslim rule was thus the necessary introduction of two parallel systems of law in India in place of the only original system of Hindu law.

A third system of law was yet to be introduced into India after the advent of the Britishers and the introduction of the British system of administering justice in India. The British system more or less equally affected the existing laws of the country, namely, the Hindu law and the Muslim law. The bias or prejudice that was to be seen explicitly or implicitly in the distinction between Hindu law and Muslim law during the Muslim

period was for obvious reasons not to be noticed in the British period. During this period, Hindu law and Muslim law were affected almost in an identical way, so far as their subsequent development was concerned. The importance of the effect of British administration on the growth of Hindu law can hardly be over-emphasised.

No body could dream that a simple trading concern which was incorporated in England on the last day of December in 1600 A.D. would one day be responsible for including India in the British Empire as its "brightest jewel". The political growth and prosperity of the East India Company[1] could not be possible in a day or a year. The Company established its first factory at Surat in 1612. And in 1615 Sir Thomas Roe, the ambassador of king James I of England, succeeded in securing certain privileges for the English people from the Mughal emperor Jahangir. Thereafter the powers of the Company began to grow from more to more until it was ultimately divested of the administration and governance of its territorial units in 1858, when in consequence of the Sepoy Mutiny, the crown of England took the responsibility of governing India. During this long period, covering almost two hundred and forty-six years, the Directors of the Company frequently adopted different measures for the administration of justice in both civil and criminal cases, not only among the English people themselves, but also among parties involving both the English and the Indians or the Indians alone. Thus this period is undoubtedly very important in the Indian Legal History in general and the Hindu Legal History in particular. As a matter of fact, Hindu Legal History in a sense also means and includes the topics of Indian Legal History as well, subject to the inclusion of the administration of Muslim law in India. The question of Muslim law also had to be considered in some details in connection with the actual administration of Hindu law during the Mahomedan rule in India. In the British period also, the administration of justice affected the Hindu law as well as the Mahomedan law almost in the same way, as it was one of the general principles of the Britishers that in certain specific topics, Hindu law was to govern the Hindus and Muslim law was to govern the Mahomedans. Excluding these specified topics, the residue was affected uniformly in order to do away with the distinctions between two

1. The full official designation of the Company was "The Governor and Company of Merchants of England trading in to the East Indies". Another Company was incorporated in England in 1698 under the name of "The English Company trading in to the East Indies". These two Companies, however, were amalgamated in 1708 as the result of the mediation of the Prime Minister of Queen Anne and came to be known as "The United Company of Merchants of England trading in to the East Indies".

parallel systems of law. The Britishers undoubtedly succeeded in narrowing down the scope of the difference between the two systems of law.

The East India Company added to the complexities that were already existent in India. There were already two distinct communities with two distinct systems of laws, more or less based on their respective religions. With the incorporation of the East India Company, many English people came to India. They had their own religion and law and naturally they could not be very readily agreeable to submit to the Indian laws and tribunals. Hence the first thing that was sought to be done by Sir Thomas Roe from the Mughal emperor Jahangir was to secure for the English people the application of their own laws *inter se*, though it was, agreed upon that disputes between the English and the Indians would have to be adjudicated by the then prevailing Indian courts following the Indian laws. These features of judicial administration made the confusion worse confounded; for it was not only the question of introduction of English law for the English people; the application of Indian law also was to be considered for the English people, when one of the parties was an Indian.

Again originally the English law was to be applied by the Governors and Councils or their employees only in disputes concerning the servants or the workers of the Company. But in course of time, English law was being applied even to the Indians also who happened to reside within the territorial jurisdictions of the Company and sometimes to the Indians in general, irrespective of the question of residence or employment. This aspect of the administration of law gave, in course of time, an inexhaustible scope for introducing principles of English law superseding those of the Indian laws. There was also difference in the constitution and the authority of the different courts. Some courts were established by the Charters of the British Crown and they were known as the Royal Courts, as contra-distinguished from the Company's courts. Above all, there were constant conflicts between the executive and the judicial organs of the Company itself. All these complexities added to the importance of Indian Legal History in general and the Hindu Legal History in particular. The introduction of the British system of judicial administration was so gradual and step by step that a treatment of the whole period noticing the important landmarks is a desideratum. The chief interest, of course, of this historical treatment lies in the fact that some of the principles of Hindu law were accepted, some of them were modified and some others were discarded : On many occasions many independent doctrines of English law also were imported on account of the expediency of each particular case in consideration of "justice, equity and good conscience".

On account of the slow and gradual method of introducing British principles in the administration of law in India, it is not possible to point to any particular year or particular Regulation for ascribing the introduction of the British influence in the sphere of judicial administration in India. Theoretically the Mughal rule in India lasted upto the year 1858 when the last Mughal emperor Bahadur Shah II was sent to Rangoon in exile on allegation of his having participated in the Sepoy Mutiny. But by this time, the Company had taken various measures to change the law of the land and introduce priniciples of English law and the English system of judicial administration. Things developed differently in the different provinces of Bengal, Madras and Bombay. But direct and material intervention began from the year 1772, shortly after the assumption of Diwani of Bengal, Bihar and Orissa by the East India Company, in 1765 from the Mughal emperor Shah Alam II. Hence the beginning of the British period for our purpose has been fixed at 1772. The present chapter will be devoted to the history of the introduction of British administration of justice in India. In the next chapter an attempt will be made to estimate the extent of influence of the English legal system in the actual growth of Hindu Legal History during this period.

2. The East India Company at Surat

From very early times, India had trade relations with the various countries of Europe through Arabia. Afterwards many Euorpean merchants or trading corporations came to India for this purpose and established many trading centres here. The East India Company[2] incorporated in England in 1600 during the reign of Elizabeth also came to India and started a factory at Surat.[3] According to the very Charter of the East India Company, the general court was authorised to legislate under certain limited conditions and circumstances. The Company could make laws for the good administration of the Company and also punish its servants for the violation of these laws, if there was any. The punishment was in the form of fines and imprisonment. Laws and punishments were to be not in repugnance to the general laws of England. No capital punishment could be inflicted. The original legislative and judicial powers of the Company, though very rudimentary in nature, were the future sources for introducing new English law into India.

2. For the full designation of the Company, see foot note I.

3. Surat was already an important port. In the contest between the Portugese and the English, the naval power of the former was destroyed once for all.

At Surat the English had to come in conflict with the Portugese merchants who were the first persons to have settled there. But ultimately defeating the Portugese,[4] the English established their first factory at Surat in 1612. In the meantime the Charter of the Company was re-newed[5] by the Charter of 1609, by James I.

In 1615, Sir Thomas Roe succeeded in securing for the English people the application of English law for their governance *inter se* by their own tribunals. But whenever there was any dispute between the English on the one hand and the Hindus or the Muslims on the other, they were to be governed by Indian courts which would administer the then prevailing Indian law. At Surat, however, there was no other English court. The President and tht Council of the Surat Factory would administer criminal law.[6] The President and Council was authorised to "chastise, correct and punish[7] all and every subject of us, our heirs and successors employed by the Company." The President and the Council was also to administer civil law. But none of them was expert in law, far less in English law. What they used to do was to apply only common sense. There was strictly speaking no regular and systematic law for their guidance. It should be noticed that the executive body of the Company thus happened to exercise the entire judicial function also, thus combining at a very early stage, the executive and the judicial functions[8] of the Company in the selfsame persons. During this time the administration of justice by the Mughal emperor also was not very satisfactory—particularly in cases which were not adjudicated by the emperors themselves.[9] On many occasions the English people without taking

4. The Portugese laws and customs also were largely prevalent in their settlement for sometime until they were formally abolished and replaced by the English law in 1672, when a new system of administration of justice was introduced by a governmental proclamation on August 1, of that year.

5. This renewal of the Charter did not make any material change in the terms and conditions, as the functioning of the Company was generally found to be satisfactory and profitable.

6. The English king James I authorised the Company to issue Commissions to any of their President and his Council to administer jusfice in criminal cases.

7. Death sentence could be inflicted only when the alleged offence constituted an offence of mutiny or any other felony and when it was tried with the help of a Jury of at least twelve English men.

8. This unhappy state of things is still continuing in India though some of the states have already taken some tangible steps for the separation of the executive and the judiciary. We shall have to refer to many important cases in which this conflict between the executive and judiciary culminated.

9. The Mughal emperors were well-known for their impartiality and integr ty ; but the same thing could not be vouchsafed for their representatives or employees.

recourse to the tribunals of the soil used to take law into their own hands.[10] Surat lost much of its importance when the seat of the President and Council of the company was shifted to Bombay therefrom in May, 1687.

3. The earliest legal system of Madras

Madras was founded in 1639 on a plot of land granted to the Company by one Hindu Raja of the locality. The fort established there was known as the Fort St. George. The Raja while granting the land also empowered the Company to administer an adjacent village which was named Madras Patnam and which in no time grew to be a very prosperous town.[11] Madras was originally only an Agency of the Surat factory and the Agent of Madras used to administer all the affairs of the Agency. Madras was raised to a Presidency in 1666. Unlike Surat, Madras had no regular Mughal courts and hence the administration of justice at Madras specially by the foreign merchants was fraught with many difficulties. The Fort came to be known as the White town and the village adjacent to the Fort came to be known as the Black town.[12] The English settlors of the White town were governed by the Agent and his Council, so far as the judicial administration was concerned. though none of them was a legal expert. In the Black town, on the other hand, reliance was placed on the existing Choultry court which could deal with only minor cases of civil and criminal nature.[13] The English were not concerned with the administration of justice in the Black town.

The Charter of 1661[14], however, gave very wide powers to the Company. The most important provision of this Charter was that the Company was empowered to appoint Governors and Councils in their Indian settlements and that these Governors and Councils were further

10. This unhappy state was sometimes connived at, as more or less every employee of the Company was engaged in private trade as well.

11. Many people were attracted to this village on account of some facilities that were offered by the rapidly expanding trade and commerce after the advent of the British merchants.

12. Black town was the name given to the village, as it was inhabited by the Indians. All the white people used to live inside the Fort which came to be known as the White town.

13. An Indian was hauled up for murdering an Indian woman. The Agent took evidence and found the man guilty. The report of the case was submitted to the Raja who ordered for doing justice according to English law. Herein we find a very nice principle of avoidance. The Agent was trying to avoid taking initiative in a capital offence. And the king also readily allowed the case to be governed by the English law. The culprit was hanged. This trial further indicates that the English submitted to the overlordship of the Indian rulers.

14. This Charter is a very important landmark in the Indian Legal History It was granted by Charles II on April 3, 1661.

authorised to try all cases both civil and criminal[15] concerning all persons belonging to the Company or living under them according to the laws of England[16]. As it has already been seen, Madras was raised to a Presidency in 1666. So the mere Charter of 1661 did not entail any immediate change in the administration of justice in Madras. A criminal case was perhaps indirectly and remotely responsible for the raising of the status of Madras. In this case, one Mrs. Ascentia Dawes was accused of having murdered her slave girl. The Agent and Council referred the case to the authority in England. The Company resolved that Madras should be raised to a Presidency which was actually done. Then according to the terms of the Charter of 1661, this case was tried by the administrative head of Madras who became the Governor and his Council, helped by a Jury. The accused was, of course, acquitted[17]. The Governor and the members of the Council had no legal training or knowledge as usual; they, therefore, wrote to the Company explaining the difficulties, experienced by them in the administration of justice and suggested[18] the necessity of expert assistance. This suggestion, of course, was not heeded by the Company. With the appointment of S. Master as the Governor of Madras in 1678, the whole judicial system of Madras was re-organised and re-vitalised. The Governor and the Council regularly sat twice a week and tried all cases with the help of a Jury. This court came to be known as the High Court of Madras. The original Choultry court also was re-organised. Instead of an Indian, an English servant of the Company was to preside over it. Their respective jurisdiction was defined[19] and appeals from the decisions of the Choultry court lay to the court of the Governor and Council.

The Charter of 1683 authorised the Company to establish Admiralty courts in order to check illegal traffic and punish piracy which became so common. Under this Charter of 1683, the Admiralty court of Madras was started in 1686. This court was to try all cases—merchantile or maritime in nature and all offences committed on the High seas or within the Charter limits. The most important provisions of the Charter of 1683 were that all cases were to be tried according to equity and

15. The powers given by this Charter were much wider. No restriction was imposed regarding punishment. Even capital punishment could be inflicted by them.

16. This was a sort of invitation by the Raja for introducting English law for the administration of Indian people.

17. Love, Vestiges of Madras, I, 404, 405.

18. *Ibid.* At one time the absence of legal experts in trials of cases was regarded as a blessing for the executive heads of the Company.

19. The Choultry court could try cases valued upto Rs. 150/- only. All other cases of higher value and appeals from the decisions of the Choultry court were to be heard by the High Court.

good conscience[20] and the laws and customs of merchants and also that each Admiralty court was to consist of a person learned in the civil law[21] and two merchants to be nominated by the Company. After the establishment of the Admiralty court at Madras and the appointment of Sir John Biggs as the man learned in civil law, the Governor and Council of Madras ceased to exercise judical functions which were now being exercised by the Admiralty court in all general cases—both civil and criminal. The criminal cases were tried with the help of a jury.

In 1688 was started the Mayor's court at Madras on the strength of a Charter, issued in 1687. This Mayor's court was different from the Mayor's courts that were established later on in 1726. This court was started by the Company itself, whereas the subsequent Mayor's courts were established by the English crown. The Mayor's court was a distinct unit of the Madras corporation started by the same Charter in 1688. The Mayor and the Aldermen constituted the court and all of them being lay men, a man "skil-ful in law" was to be attached to each Mayor's court as the Recorder[22]. The corporation of Madras was established in order to carry on some public benevolent works. The native elements[23] also were included, so that fund could be raised easily and readily. During 1686 and 1726, there were three courts functioning in Madras—the Choultry court,[24] the Mayor's court[25] and the court of Admiralty[26].

20. This provision had to be made in as much as there was no body of regular law ; the entire law was based on customs and usages.

21. This is the first instance of having trained lawyers for administering law.

22. Sir John Biggs, the Chief Judge of the Admiralty court, was also appointed the Recorder of the Mayor's court. But after his death in 1689, when no other suitable man was available, the Governor and the Council acted as the judges of the Admiralty court. John Dolben was appointed a judge of the Admiralty court in 1692 which ceased to function after the return of this judge to England in 1704.

23. The first corporation of Madras started with twelve Aldermen of whom three were British subjects, three were Hindus, one was a French, two were Portugese and three were to be Jews or Armenians.

24. After the creation of the Mayor's court at Madras, the Choultry court was to try only minor offences and civil disputes involving properties worth only two pagodas.

25. The Mayor's court was simply a court of common sense, as all the cases were tried with reference to equity, justice and good conscience. The decisions, therefore, were far from uniform and systematic.

26. It is very significant that after the death of Biggs in 1689, when the Governor and Council of Madras used to act as the judges of the Admiralty court, two merchants were also associated with them. One of them was an Armenian and the other was a Hindu. When the Admiralty court ceased to function since the return of Dolben to England in 1704, its jurisdiction including the right to hear appeals from the Mayor's court was exercised by the Governor and Council. So the three courts that functioned after 1704 were the Choultry court, the Mayor's court and the court of Governor and the Council.

4. The early judicial system of Bombay

Bombay grew from an un-important village which was obtained by the Portugese in 1534, from the king of Gujrat. The Portugese king again made a gift of it to king Charles II of England in 1661, as a part of the dowry, when the latter married the sister of the former. King Charles on his turn handed over Bombay to the Company on a nominal annual rental of £ 10 in 1688. A Charter issued in the same year empowered the Company to administer Bombay by making laws and ordinances and also by enforcing them. The Company was further authorised to establish courts of justice at Bombay for trying civil as well as criminal cases following the lines of English courts, as faithfully as possible. The legislative authority also was to be exercised not in a way repugnant to the laws and customs of England. Originally Bombay was under a Deputy Governor and a small Council under the Governor and Council at Surat. In 1687, the President and Council of Surat were transferred to Bombay.

The first judicial system in Bombay was ushered into existence in 1670 by Gerald Aungier who is justifiably regarded as the true founder of Bombay. According to this system which was quite simple, two courts[27] were started in the two divisions[28] of Bombay. All the judges were honorary. There were some Indian judges also.[29] Above these two courts in the two divisions, there was the court of the Deputy Governor and Council. This court had both original and appellate jurisdictions. The cases that could not be taken cognizance of by the divisional courts were tried by this court[30] in its original jurisdiction and at the same time it heard appeals from the decisions of the lower courts. This judicial system was not satisfactory even to the mind of Aungier. He very keenly felt that the lack of legal knowledge on the part of the judges proved very inadequate in doing true justice. Moreover the exercise of judicial functions by the executive heads was also highly unsatisfactory for obvious reasons. Aungier tried to secure the service

27. Each court was to consist of four or five judges empowered to hear cases of small thefts and civil cases, where the value of the subject-matter did not exceed 230 Xeraphins which was equivalent to merely Rs. 150/-

28. One division comprised Bombay, Mazagaon and Girgaon and the other comprised Mahin, Paul, Sion and Wosli.

29. Indians were appointed as judges partly for the reasons that no suitable English men were always availiable to work on honorary basis and partly for the reasons that the new institutions were in need of being made popular to the inhabitants of the country.

30. All trials in this court were to be with the help of the jury.

of trained lawyers as judges, but with no result. The Company from the very beginning was against the introduction of legal experts in their affairs of the new settlements. After the selection of George Wilcox for the post of the judge, the old system was abolished in 1672 and it was replaced by a new system.

According to this new system a court consisting of a judge was established in Bombay. This court had jurisdiction to try all cases civil, criminal[31] and testamentary. All cases were tried speedily and civil cases were tried with the help of a jury. Appeals from this court lay to the court of the Deputy Governor and Council of Bombay. The post of the judge was made stipendary[32] and court-fee also was to be paid *ad valorem*.[33] This might be regarded as the the central court. There was another court for deciding petty civil cases and it was known as the "Court of Conscience." This court dispensed justice without any cost on the part of the litigants. George Wilcox also used to preside over this small cause court. This system continued upto the out-break of the "Keigwin's rebellion" and ultimately it was stopped in 1683.

Under the Charter of 1683, an Admiralty court was started in Bombay on exactly the same lines as in Madras. But the events in Bombay took a very unfortunate turn due to the conflicts between the Admiralty judge Dr. John and the president of the Surat Factory, Mr. Child. One of the reasons suspected for this conflict is said to be the supposed cognizance of some accusations against Mr. Child by Dr. John. Though Dr. John was distrusted by the Executive of the Company from the beginning on account of his independent spirit and action, still the Admiralty court survived until the invasion of Bombay by Siddi, the Admiral of the Mughal emperor.

As it has already been noticed, the seat of the President and Council was shifted from Surat to Bombay in 1687. In 1718 a new court of judicature was established at Bombay.

This court consisted of nine judges including the Chief Justice; four of the puisne judges were to be Indians.[34] Appeals from the decisions of this court lay to the Governor and Council. Three English judges formed

31. For the administration of criminal law, an English man was appointed in each division as the Justice of the Peace. His duty was to arrest the culprit, enquire into the allegations and finally help the judge like assessors.

32. The judge was to get a salary of Rs. 2000/- per year; but he could not engage himself in any other trade.

33. This court-fee was levied at the rate of 5 p.c.

34. The four Indian judges were selected to represent the four most important communities of that time. They were the Hindus, the Muslims, the Portugese and the Parsis.

the quorum.[35] One of the peculiarities of this court in its criminal administration was that offenders could be kept imprisoned during pleasure.[36] Besides this court was not bound to follow any definite law for procedure or evidence. Even a man could be convicted on suspicion and doubt. The trials were not by jury. The Indian element in the constitution of this court was a distinct improvement from the stand point of Indian Legal History. This court continued to function until 1726 when the Mayor's courts were established in the Presidency towns of Madras, Bombay and Calcutta.

5. The early judicial system of Bengal

Job Charnock and his party landed at Sutanati, a village on the bank of the river Hughly, on August 24, 1690. There they started the construction of a Fort. In 1698, the Company succeeded in securing the Zemindary of the three neighbouring villages of Sutanati, Culcutta and Govindpur from Azim-ush-shan, a grand-son of Aurangazebe, who was the Subedar of Bengal. Culcutta was declared to be a Presidency in 1699 to be administrated by a President and Council. This acquisition of the Zemindari by the Company was a very significant event, so far as the Indian Legal History was concerned.

Originally the Zemindars in Bengal were entrusted with the collection of revenues and maintenance of law and order within their respective Zemindaris. The condition of administration of justice was extremely deplorable. There were some courts at Murshidabad, but they had very little contacts with the remote parts of the province. Taking advantage of this vacuum, the Zemindars assumed, without any definable authority, the power to administer justice, both civil and criminal, more for their own interest and exploitation than for the pure and honest administration of justice. In its Seventh Report, the Committee of Secrecy, appointed by the House of Commons in 1773, gives a real picture of the administration of justice of the time. Each Zemindar maintained a criminal court as well as a Kutchery or Adalat for the administration of civil law. In the criminal side, all cases including capital offences could be tried by the Zemindars.

35. The presence of the Indian judges was not indispensable for the quorum. This, among other things, indicates that the Indian judges did not occupy the same important position as the English judges. This is corroborated by some facts which indicate that names of the English judges were always recorded for each day's sitting. But the names of the Indian judges did not occur any where. They were simply mentioned as "the Black Justices".

36. During the Mughal administration of criminal justice also, a prisoner could be detained indefinitely in prison until he happened to be released by the order of the emperor or showed signs of repentance.

Capital sentences were to be subjected to the approval of the Nawab of Murshidabad. In the civil side also appeals lay to the Nawab's court from the decisions of the Zemindars.

The Company also after securing the Zemindari began to administer justice in Calcutta through a collector who was also sometimes known as the Zemindar, in all cases both civil and criminal. But the court of the Company's collector differed[37] from the courts of the other Zemindars. The collector used summary methods in administering justice without the help of the jury. The collector's courts tried cases among both the Indians and the English people. The serious criminal offences used to be tried by the Governor and Council according to the Charter of 1661. Too many powers were given to the collector who, however, continued to administer justice in a primitive and rudimentary manner, until the establishment of the Mayor's court in Calcutta in 1727, as in the other Presidencies of Madras and Bombay. The Mayor's courts were royal courts, as they derived their authority from the Crown.

6. The Mayor's courts at Madras, Bombay and Calcutta

The Charter of 1726[38] established for the first time three Mayor's courts in the three Presidencies on uniform basis. This was undoubtedly a very significant stage in the Indian Legal History. The above Charter was rightly known as the "Judicial Charter". In view of the growing prosperity of the English settlements in India, the Directors of the Company keenly felt the necessity of better administration of the territorial units by more organised and more systematic legislative and judicial instruments. The same Charter of 1726 established not only the Mayor's courts, but also the Corporations. One such Corporation and one such court were already established in Madras under the Charter of 1687. But things were changing very rapidly in many directions. To govern the devolution of the properties left by the English people in India after their death was another consideration why courts with royal authority were regarded as a desideratum.

The Mayor and the Aldermen were to form the Mayor's court which was a court of record. These courts were to have only civil jurisdiction including testaments. The criminal cases were excluded from these courts

37. Appeal from the decisions of the collector's court lay not to the Nawab of Bengal but to the Governor and Council in Calcutta. Similarly for the confirmation of any capital sentence also, the collector referred the case to the Governor and Council and never to the Nawab of Murshidabad.

38. It was granted by king George I on September 24, 1726.

and they were entrusted to the Governor and five senior members of the Council. Each of them was a Justice of the Peace. They also were to have the powers of a court of "Oyer and Terminer" and "Gaol Delivery". There was also provision for appointment of Grand Jury and Petty Jury.[39] The Charter insisted on the application of English laws and principles, as far as they were applicable. The legislative powers were so long vested only in the general Court or the Court of Directors in England. The Governor and Council of each Presidency was empowered to make by-laws, rules and ordinances for the better governance of the settlements. In many respects the Mayor's courts of 1726 were more retrogade in character.[40] But there were some innovations also. It was for the first time that provision was made for appeal to the King in Council subject to certain conditions.[41]

The actual working of the Mayor's courts was far from satisfactory. The independence of the Corporation and Mayor's courts was very much disliked by the executive of the Company. There were in the result constant conflicts between these different organs[42]. So far as the Indians were concerned, these courts gave rise to greater difficulties and inconveniences. The laws and customs of India were not at all respected and hence the courts gave rise to some discontent among the Indian people. When the interferences of the courts were brought to the notice of the Governor and Council, they resolved that the courts were not authorised to deal with caste and religious questions of the Indians.

39. The function of Grand Jury was confined to the presentment of persons who were suspected of any crimes. They were also known as the Jury of Presentment. They were to decide if there was any case for trial at all. The actual verdict of guilty or not guilty was to be returned by the Petty Jury. The Grand Jury consisted of 23 persons.

40. Thus the old Madras Mayor's court was not bound by any technical rules of the English law and procedure. And to that court was attached an expert of law as the Recorder. No such provi ion was made in the Mayor's courts established subsequently.

41. An appeal to the King in Council lay only when the subject-matter of the dispute was valued at one thousand pagodas or more.

42. In Bombay a Hindu woman became converted to Christianity in 1730. She had a son, aged about 12 years who went to live wiih his relatives. On a charge made by the converted woman, the Mayor's court ordered that the boy should be returned to the mother. The heads of the caste made a complaint to the Governor and Council who contended that the Mayor's court had no authority to decide "causes of a religious nature or dispute concerning castes among the natives." The Mayor's court protested against this resolution.

In another case, brought by an Arab merchant, the decision of the Mayor's court was reversed on appeal by the Governor and Council.

In Madras and Calcutta also there were too many occasions where there were conflicts between the executive and the judiciary.

The Charter of 1753 removed some of the glaring disadvantages that were to be seen in the provision and working of the Charter of 1726. The most conspicuous provision of the new Charter was whereby the Corporations and the Mayor's courts were made definitely subservient to the Government or the Executive of the Company. According to another provision, the Charter expressly exempted the Indians from the jurisdiction of the Mayor's courts and directed that such suits and disputes should be determined by the Indians themselves, unless both the parties submitted them to the adjudication of the court. A new court, namely, the "Court of Request," was established in each Presidency to try minor disputes.[43] Under the Charter of 1753, the courts that were functioning were the courts of Requests, the Mayor's courts, the court of the President and Council for criminal cases and hearing appeals from the decisions of the Mayor's court and the King in Council as the highest court of appeal. The judiciary under the Charter of 1753, was quite subservient to the executive. Thus Ferminger rightly says, "The weakness of the judicatures of 1726 and 1753 arose from the fact that they tended to be in fact but branches of the Company's executive Government, and they, therefore, afforded imperfect means of resistance to the class interests of the Company's servants at a time when the Company's servants were bidding fair to monopolise the trade of the country."[44] Inspite of the several defects of the system of administration of justice under the charter of 1753, the Mayor's courts were subject to the supervision of the Company. Every year the proceedings of these courts were scrutinised by the Company's counsels who would suggest necessary instructions for the guidance of the courts, so that they might administer justice fairly and efficiently following English principles and procedure, as far as practicable in the Indian circumstances.[45]

7. Diwani of Bengal, Bihar and Orissa

The Company assumed the Diwani of Bengal, Bihar and Orissa in 1765. This was undoubtedly another very important landmark in the evolution of Indian Legal History. The Company also undertook to administer civil and revenue law and the administration of the criminal law remained with the Nawab. During this time the courts that were

43. The jurisdiction of these courts was limited to 5 pagodas.

44. Fifth Report, Introduction 1, XXIV.

45. The House of Commons appointed a Committee of Secrecy in 1772 to enquire into the affairs of the Company. In the result Supreme Court was established at Calcutta and later on at Madras and Bombay also.

functioning under the Mughal system at the Governmental seat of Murshidabad were the court of the Nawab or the Nazim, court of the Diwan, the Darogah Adalat-al-Alia and the Darogah-i-Adalat-Diwani. These courts had both original and appellate jurisdiction. Besides the above courts at Murshidabad, there were also some other tribunals that functioned. There was a Qazi to decide civil cases and disputes regarding inheritance and succession. Mufti expounded the law for the Qazi and the Faujdar tried all criminal cases exceptnig the capital offences.[46] The powers of the Nawab of Bengal was becoming more and more shadowy and the courts would not function regularly and fairly. The Zemindars were usurping the judicial powers for their own interests and exploitation. The Murshidabad courts also became very weak and irregular and were lacking in the powers of supervision over the other courts. There was chaos and corruption everywhere, as A. B. Keith[47] justly remarks. Warren Hastings who was the Governor of Calcutta at the time, formulated a scheme in 1772 for the better administration of the revenue and law for Bengal, Bihar and Orissa. According to this plan of 1772, the whole of the Diwani area was divided into several districts. In each district there was a collector who was primarily responsible for the revenue. In each district again there was a court for deciding civil cases. It was known as Mafussil Diwani Adalat which had jurisdiction in all civil cases including property, inheritance, marriage, debts, accounts, contracts and partnership etc. Similarly for each district there was established a criminal court, named Mafussil Nizamat or Faujdary Adalat.[48] Besides the above courts, established for the Districts, there were two superior courts established in Calcutta. They were known as the Sadar Diwani Adalat[49] and the Sadar Faujdari or Nizamat Adalat.[50] There was also arrangement for establishing some courts in which disputes of minor values could be decided by the Head Farmer of the Pergunnah. The most important direction of the Diwani Adalats was that all cases of inheritance, marriage, castes and other religious usages and institutions should be tried according to the law of the Koran with regard to the Mahomedans and the laws of the Shaster with respect to the Hindus. It was furhter pro-

46. Cognizance in cases of drunkenness, selling of liquor and examinations of false weights and measures was taken by the Mohtassib.

47. A Constitutional History of India, pp. 63-64.

48. In these courts the Qazis and Muftis assisted by two Maulavis used to sit as judges for deciding criminal cases.

49. It consisted of the Governor and the members of the Council hearing appeals from the Muffussil Diwani Adalats.

50. It consisted of an Indian judge who was known as the Daroga. He was to be appointed by the Nawab and assisted by the Chief Qazi, the Chief Mufti and three Maulavis.

vided that to assist the English judges who were otherwise quite ignorant about the laws and customs of the Hindus and the Muslims, Maulavis and Pandits would attend the court for expounding the law.[51] The courts of the Zemindars were abolished and procedure of trials was made cheap and speedy. To ensure and promote impartial and honest administration of justice in the country, it was laid down that all courts would maintain proper registers and records of the Mafussil Diwani Adalat should be sent to the Sadar Diwani Adalats for their supervision.

There were certain glaring defects of the plan of 1772. Thus the collectors were burdened with too many powers and responsibilities. These defects were removed by the plan of 1774 according to which the whole Diwani of Bengal, Bihar and Orissa was divided into six divisions which were again subdivided into several districts. In the divisional Head-Quarters, there used to be a small Council consisting of four or five English convenanted servants of the Company which was responsible for the revenue of the district. Each district had an Indian officer known as the Diwan in place of the former collector. He was also to sit as the judge of the Mafussil Diwani Adalat. Appeals from this court were to lie to the provincial council of the Division. The Sadar Diwani Adalat was again to hear appeals from the decisions of the Provincial Council of the Division.

8. The Supreme Courts of Judicature in Calcutta, Bombay and Madras

The battle of Plassey in 1756 had virtually transferred the political authority of Bengal to the Company. But the Company instead of taking the entire responsibility placed the Nawab on the throne of Bengal. For a long time beginning from 1756, Bengal was in a very unfortunate state of chaos, confusion and corruption being rampant and absolutely unchecked. Taking advantage of the lack of control from the Nawab and the existence of any efficient civil or judicial administration, the servants of the Company were oppressing and exploiting the people with impunity. During this time the employees of the Company were after making money for themselves with whatsoever means possible. When they returned to the country with fabulous wealth, they roused suspicion even in the minds of the ordinary people of England, who used to style them as Nawabs. The attention of the Parliament also was drawn to this state of affairs which

51. This provision was made undoubtedly with the best of intentions. The English judges could not read for themselves the original texts enshrining the laws of the Hindus and the Muslims. Warren Hastings was really anxious to see that justice was administered impartially and fairly in the country. The plan of Warren Hastings played a very important part in the development of the separate systems of Hindu and Muslim Law.

needed immediate correction. With a view to remedying the evils the Regulating Act of 1773 was passed by the British Parliament.[52]

The Regulating Act made important amendments in the rules regarding the constitution and administration of the Company. Some legislative powers also were newly given. But the most important innovation that was made by this Act was the provision for establishment of a Supreme Court of Judicature at Fort William. The changes were imperative in the sense that the Select Committee and the Committee of Secrecy were persistently unearthing the most glaring defects of the working of the Company and the activities of its servants. After the battle of Plassey, the town of Calcutta was treated as a part of British settlement and the rest of Bengal, Bihar and Orissa was supposed to be under the *de jure* sovereignty of the Mughal emperor though the *de facto* authority was vested in the Company. This difference was scrupulously maintained even by the Regulating Act. The most conspicuous provision made by the Regulating Act was regarding the establishment of the Supreme Court in Calcutta by a royal Charter.[53] The Supreme Court was to consist of one Chief Justice and three puisne judges who were to be appointed by the king from Barristers of not less than five years' standing and who were to hold office during the pleasure of His Majesty.[54] The powers of this court were very wide including civil, criminal, ecclesiastical and admiralty jurisdictions. For the town of Calcutta, grand jury and petty jury consisting of English men were to be used It was also a court of Record. For treason and felony, this court could try even the Governor General or the members of his Council. No law enacted by the Governor General and Council could be treated as valid and effective unless it was registered and published in the Supreme Court of Judicature. The Supreme Court was to be a court of law as well as of equity and the judges of this court were to have the same jurisdiction and authority as the justices of the court of King's Bench in England. The Mayor's court and the court of Oyer

52. A Governor General and a Council of four members were appointed for Calcutta and the Presidency of Fort William. They were entrusted with the entire civil and military powers, Warren Hastings was appointed the first Governor General and three of the members of the Council also came from England, In matters of war the Presidencies of Madras and Bombay also were placed under the control of the Governor General and Council of Calcutta.

53. In terms of the provisions of the Regulating Act, the king George III issued a royal Charter on March 26, 1774 for establishing the Supreme Court of Judicature at Fort William in Bengal.

54. It is for the first time that all the judges of the court were trained and experienced lawyers. appointed by the Crown to hold office during the pleasure of His Majesty. These judges could necessarily be expected to be independent and efficient.

and Terminer and Gaol Delivery functioning under the Charter of 1753 were superseded. The only court that still continued to work was the Court of Request. Subject to certain conditions[55] appeals from the Supreme Court could lie to the King in Council. According to the Charter this court was granted the power to reprieve or suspend the execution of capital sentence. The system of Advocates and Attorneys was also introduced for the first time subject to the control[56] of the Supreme Court. No body except the Advocates and the Attorneys could appear and plead before the Supreme Court of Judicature. The Supreme Court of Judicature removed most of the glaring defects of the judicial administration in the country and the introduction of trained and professional lawyers, as its judges, toned up the entire system. The judges could act independently and competently.

According to the Regulating Act, the Governor General and Council were vested with "the whole civil and military Government of the Presidency of Calcutta" and also with "the ordering, management and Government of the territorial acquisitions and revenues of the kingdom of Bengal, Bihar and Orissa." The Supreme Court of Judicature on the other hand had "full power and authority to hear and determine all complaints whatsoever against any of his Majesty's subjects for any crime, misdemeanour or oppression and also to entertain, hear and determine any suit or action whatsoever against any of His Majesty's subjects in Bengal, Bihar and Orissa." On account of the different powers given to the Governor and Council on the one hand and to the Supreme Court on the other, there was a constant conflict between these two supreme bodies. To some extent, the ambiguities, the indistinctness and defective draftsmanship of the Act and the Charter were responsible for this unhappy state of things. In the long history of the conflict, three topics became most conspicuous : one of them was the claim of the Supreme Court to exercise jurisdiction over the English and Indian officers of the Company, employed in the collection of the revenues and to punish them for corrupt and oppressive acts, done in course of their official duty ; the second topic was the right that was claimed by the Supreme Court to try the judicial officers[57] of the Company in execution of their official functions and the

55. One of the conditions in civil cases was that the value of the subject-matter was to exceed 1000 pagodas.

56. The number could be regulated by the Court as it deemed fit and necessary.

57. The conflict reached the climax in the Patna case which created a great sensation in the country. In this case the dispute was with respect to a large property left in India by Shahbaj Beg Khan who came from Kabul. After his death, Bahadur Beg, a nephew of the deceased, claimed the whole property alleging that he had been adopted by the deceased.

third topic was the claim of the Supreme Court that any person residing in Bengal, Bihar and Orissa beyond Calcutta who contended that he was not subject to the jurisdiction of the Supreme Court must have to appear before it and plead accordingly.[58] Thus Ferminger also rightly says, "The Council and the Court atonce came into collision, the former holding that the Act exempted its officers from the jurisdiction of the court in respect of acts done by them in collection of the revenue. while the latter maintained that the duty of hearing cases in which the revenue-officers were complained against, on the score of illegal acts, was precisely one of the most important purposes for which the Supreme Court had been created. Here as will be seen was afforded an opportunity for a violent quarrel between the executive and the judicial powers."[59] Some of the methods of the Supreme Court also were very oppressive and troublesome. Stephen[60] rightly remarks that "the law of arrest on Mesne Process was beyond all question one of the worst and the most oppressive points of the law of England, as it stood down almost to our own times. Its introduction into India was indefensible."

The conflict between the Council and the Court came to a climax

The wife Nadera Begum, on the other hand, claimed the entire property on an alleged gift. The procedures followed by the law officers were most irregular and illegal. The Begum prefered an appeal to the Sadar Diwani Adalat which took no action at all. Then the Begum filed an appeal to the Supreme Court of Judicature at Calcutta which issued a writ of Capias on the defendants (*i.e.* Bahadur Beg, the Kazi and the Muftis). The plea of the officers was that they acted in their official capacity according to the direction of the Council ; but this plea was not accepted and the defendants were sent to jail for their inability to pay the compensation which was fixed at three lacs of rupees including the damage to the property and the personal injuries to the appellant. The grounds on which the Supreme Court gave the above judgment were as follows : The judicial function was entrusted to the Council, but in this case the judgment was actually given by the law officers who were never authorised to do so. The law officers were only to advise the Council on points of law. The Council could not delegate the power of trying the case to the law officers and simply act on their report. This case also illustrates the most irregular and illegal procedures followed in the cases tried by the Council.

58. One of the most objectionable and oppressive procedures to the Supreme Court was the "Arrest on Mesne Process". The defendant even in denying the jurisdiction of the Supreme Court was to appear before the court for this plea. And the court would issue "writ of Capias" to ensure the attendance of the defendant. This writ was nothing but warrant of arrest.

59. Ferminger, I, cclix.

60. Story of Nundcomer and the Impeachment of Impey, II, 145.

in the Cossijurah case.[61] The situation was almost intolerable. Though otherwise very independent and efficient, the Supreme Court came to be disliked by most of the parties concerned. The executive of the Company did not like it, the result was a constant conflict between them. The other English people also did not like this court, as it stood in their way of oppression and exploitation—which could not be otherwise checked. The natives also were afraid of the Supreme Court and its procedure—specially in view of the sensational cases, namly, the Patna case, the Cossijurah case and the case of Nand Kumar.[62] Things could not be allowed to continue in this way. In 1781, the Parliament passed an Act of Settlement to remedy the defects that became manifest by that time. As the result of the Act of Settlement provisions were made more favourable to the Governor General and Council and many important limita-

61. The facts of the case were as follows : One Cossinaut Baboo advanced a loan of a very big sum of money to the Zemindar of Cossijurah. As the loan was not repaid Cossinaut Baboo brought a suit against the defendant in the Supreme Court on August 13, 1779 stating that the defendant was an employee of the Company for collection of revenue. As usual, the Supreme Court issued the writ of Capias on bail of three lacs of rupees. The Zemindar concealed himself for the time being and thus escaped arrest. The writ could not be executed. In the meantime the collector of Midnapore comprising the Zemindari of the defendant informed the Governor General that due to concealment of the defendant collection of revenue was suffering very badly. The matter was referred to the Advocate General for his opinion. The Advocate General gave the opinion that the defendant was not subject to the jurisdiction of the Supreme Court and that he need not enter appearance. This was according to him true of all Zemindars. The Governor General also published a general notification that no Zemindar was subject to the jurisdiction of the Supreme Court unless he was in the employment of the Company or unless he voluntarily submitted to its jurisdiction. After the non-execution of the writ of Capias, the Supreme Court issued another writ to sequester the property of the absconding Zemindar. For the execution of this writ, the sheriff of the court went to Cossijurah with a small force. On receipt of this information the Governor General and Council also sent a small force to Cossijurah. The latter force apprehended the former force and brought it to Calcutta : Thus the conflict between the two organs culminated in a sort of regular battle.

62. Raja Nandcomar made certain allegations before the Supreme Council against Warren Hastings for bribery and corruption. Only after a few days he was tried for forgery and sentenced to death by the Supreme Court of Judicature in a case, brought by one Mohun Pershad. The conviction was under an Act of the British Parliament passed in 1728. After the execution of Nandcomar, it could be clearly seen that this "judicial murder" was deliberately committed as the result of an unholy conspiracy between the Governor Generl Warren Hastings and the Chief Justice of the Supreme Court of Judicature Impey—who were great friends. This has been corroborated by many Europeans themselves including Macaulay and Mill. Impey was impeached like Warren Hastings and one of the charges against Impey was the so-called trial of Nandcomar. The trial of Nandcomar has been severely criticised for more than one reasons.

tions were imposed on the rights of the Supreme Court. As a matter of fact the Act of Settlement started with the preamble that in the past conflict between the Council and the Supreme Court the former had come out victorious. Thus it was provided by the Act of Settlement that "the Governor General and Council shall not be subject jointly or severally to the jurisdiction of the Supreme Court of Fort William in Calcutta for any act done in their official capacity." The most important provision from the stand point of Hindu and Mahomedam Legal History was that "all matters arising out of inheritance[63] and succession to land and goods and matters of contract and dealing between party and party, shall be determined, in case of Mahomedans, by the laws and usages of Mahomedans and in case of Gentoos, by law and usages of Gentoos." It was further provided that "where only one of the parties shall be a Mahomedan or Gentoo, the Supreme Court shall apply the laws and usages of the defendant." The Act of 1781 put the Hindu and the Muslim inhabitants of Calcutta on the same footing as the Hindus and the Muslims of the Mafussil.[64]

In 1797 the British Parliament passed an Act whereby the Crown was authorised to supersede the judicial system of 1753 and establish Recorder's courts in both Madras and Bombay. All the restrictions imposed on the Supreme Court of Judicature at Calcutta by the Act of 1781 were also imposed on the Recorder's courts at Bombay and Madras. In 1800, the British Parliament passed an Act authorising the Crown to abolish the Recorder's court at Madras and establish a Supreme Court of Judicature instead. This was done by king George III, on December 26, 1801. The Recorder's court of Bombay was again replaced by the Supreme Court of Judicature in 1823 during the reign of king George IV. In Bombay also there were conflicts between the executive and the judiciary. On account of the opposition from the Governor and Council of Bombay, the Supreme Court declared on April 1, 1829 that "it had ceased on all its

63. To show due regard to the Hindus and the Muslims it was provided that "rights and authorities of fathers of families and masters of the families" as the same might have been exercised by the Hindus and the Muslims, shall be preserved to them respectively within their said families. It was further provided that no act done in consequence of the law of caste concerning the members of the said families only were "to be held and adjudged a crime although the same may not be held justifiable by the laws of England."

64. This provision was made following the pattern of the Regulations of Warren Hastings in 1772. "The statute must not be construed as giving the court, for the first time, jurisdiction over the inhabitants of Calcutta, but as providing that they shall not, when one of the defendants is a Hindu or Mahomedan be subject to British laws in questions of succession to lands. rents and goods and in matters of contract."

sides and that it would perform none of its functions until the court received an assurance that its authority would be respected and its process obeyed and rendered effectual by the Government of the Presidency."[65]

9. Warren Hastings and Impey

Whatever might be otherwise said against Hastings and Impey, there is no gainsaying the fact that by their well-intended and well-executed schemes and plans, they made some contributions of far-reaching character to the systematisation and regularisation of the judicial system in India, specially during the formative period after she had come in contact with the British administration. Besides the conflicts between the executive and the judiciary and the exploitation and oppression of the servants of the Company, the Patna case, already referred to, exposed the most undesirable state of things regarding the administration of justice specially in the Mafussil of Bengal, Bihar and Orissa. The judicial machinery then working was as irregular and inefficient, as it was corrupted. The provincial councils were busy more with the collection of revenue than with the administration of justice. The lack of an efficient judicial administration was rather welcome, as it largely afforded facilities for unchecked and unlimited exploitation and persecution. In the result, the so-called administration of justice was almost solely in the hands of the native officers. Hence the first thing that was done by Warren Hastings was to thoroughly re-organise the Adalat System in the Mafussil of Bengal, Bihar and Orissa. By his scheme of 1780, in each of the six divisions of Calcutta, Murshidabad, Burdwan, Dacca, Patna and Purnea, a court of Diwani Adalat was established to try civil cases. These courts were to be presided over by English men who were to be known by the designation of Superintendent of the Diwani Adalat. They were the covenanted servants of the Company. The provincial councils also were allowed to continue, but their jurisdiction was confined absolutely within revenue functions.[66] The most important feature of the plan of 1780 was the separation of the executive and the judiciary. Now the executive and the judicial functions

65. Sir Peter Grant, the only surviving judge of the Bombay Supreme Court made a petition to His Majesty against the intrusion of the Government.

66 As usual, these Adalats also used to administer Hindu law for the Hindus and Muslim law for the Muslims in matters of inheritance, marriage, caste and other religious matters. For expounding the laws of the Hindus and the Muslims, Muslim Qazis and Hindu Pandits were also to be appointed. The decisions of these Diwani Adalats were to be final except in cases where the subject-matter exceeded one thousand rupees in which case appeal could lie to the Sadar Diwani Adalat situated at Calcutta and consisting of the Governor General and Council.

were entrusted to two distinct persons which was undoubtedly a very great improvement. The Superintendents were to take oath to administer justice without fear or favour and these courts were to sit thrice a week and keep regular and proper records of all proceedings before them. Though this scheme had many advantages, it had certain disadvantages too. The number of courts was too small. People had great difficulties in attending these courts situated only at the divisional head quarters. Some provision was, however, made for the adjudication of less important cases upto the value of Rs. 100/- which could be adjudged by Zemindars or public officers close to the place of disputes. This provision also was not sufficient to meet the actual needs of the people.[67]

Sir Elijah Impey, the Chief Justice of the Supreme court at Fort Williams in Calcutta, was appointed as the sole judge of the Sadar Diwani Adalat of Calcutta in 1780. This was also a part of the general scheme of Warren Hastings who was making earnest and sincere endeavours for the systematisation and the improvement of the judicial system of the country. The appointment of Impey as the judge of the Sadar Diwani Adalat was undoubtedly a very welcome move in the sense that he was an experienced and trained lawyer of considerable eminence and celebrity. In his scheme of 1781, Impey introduced certain innovations of very far-reaching importance. He was also responsible for having compiled a sort of civil code which was based on and systematised from all the previous regulations. The most glaring defect in the scheme of Warren Hastings on account of the small number of courts was remedied by Impey who provided for eighteen courts in place of only six. Besides increasing the number of Diwani Courts, Impey made the separation between the executive and the judiciary by making express provision that the courts of Diwani Adalat were specifically debarred from taking cognizance of any revenue matter—directly or indirectly. The provision for appointing local Zemindars and officials for minor civil disputes also was favourably amended.[68] The most important provision, however, was made by Impey

67. The difficulties could not be met by the provisions where by the local Zemindars and officers were authorised to decide minor disputes for even in those cases, the proceedings had to be started at the divisional head quarters. Moreover, the Zemindars had no love for the administration of justice for its own sake. They were too often prompted by selfish interest and exploitation—specially when they were made only honorary judges. Hence the people continued to suffer inconveniences silently instead of courting greater difficulties and inconveniences in going to the head quarters of justice.

68. It was provided that for deciding disputes not involving value of more than one hundred rupees, the Zemindar or the officer of the locality was simply to report his

regarding cases among the Hindus and Muslims which were not covered by the subjects already enunciated in 1772 by Warren Hastings. It was expressly provided by Impey that, "In all cases, within the jurisdiction of the Maffusil Diwani Adalats, for which no specific directions are hereby given, the respective judges thereof do act according to justice, equity and good conscience."[69] Similar provision was made for the guidance of the Sadar Diwani Adalat also.[70] Another important provision that was specifically made by Impey, was in respect of the duties of the judges and the law officers : "No judge of any Mafussil Diwani Adalat shall upon any pretence whatsoever, cause to be made any report on any matters of fact relating to any cause pending there before him, in order to make of any decree, by any officer or officers, or any person whatsoever, other than in the cases specially mentioned in these Regulations; nevertheless that it be competent to such judge to refer any question arising on the Mussalman or Hindoo law to the Maulavies or Pandits of the court respect being had to the law in which each is conversant".[71] The question of facts of each case was to be decided by the judge himself. These definite rules were imperatively necessary in view of the state of affairs as it was revealed in the Patna case. Impey, however, could not remain associated with the Sadar Diwani Adalat for a long period. His connection with Company's court was viewed with suspicion and disfavour.[72] In the result, Impey was re-called by the Crown in 1782. when he had to lose both the posts. By the re-call of Impey, an important chapter was prematurely closed having many of its promises unfulfilled. The immediate effect of the re-call of Impey was that the Sadar Diwani Adalat again went back to the Governor General and Council.

The criminal aspect of the judicial administration did not improve to any considerable extent though Warren Hastings made some efforts for this purpose. As it has already been noticed, Hastings appointed in 1772 the court of Sadar Nizamat Adalat at Calcutta with a Muslim

finding and award to the judge who had the discretion of either accepting, rejecting or amending the award. This enabled the litigants concerned to avoid going to the Divisional head quarters personally at great cost and difficulty and at the same time the disputes would be in reality decided by the judge himself on receipt of mere reports from the arbitrators.

69. Regulation of 1781, Section LX. .

70. *Ibid*, Section XC III.

71. *Ibid*, Section XXXIV.

72. In addition to his pay as the Chief Justice of the Supreme Court of Judicature, Impey was also to be paid Rs. 5,000/- per mensem from the Company. This was regarded as very improper and unjust.

judge[73] and some Muslim Law Officers. The first thing that was done by Warren Hastings was to shift the seat of the Sadar Diwani Nizamat from Calcutta to Murshidabad. This was intentionally done to avoid the interference of the Supreme Court of Judicature. After this shifting, the highest responsibility of criminal administration was entrusted to Mohammad Reza Khan who was the Naib Nawab of that time. This step led to the still more chaotic condition in the administration of criminal justice in Bengal, Bihar and Orissa. There was no check or control over the Muffasil courts which could indulge in bribery and corruption with impunity. In 1781, Warren Hastings made provision for appointment of Magistrates and a new officer designated as the Remembrancer of Criminal Courts. The Magistrates, thus appointed, could not try any criminal case themselves. They were simply to act as the Justices of the Peace in arresting suspected criminals who had to be forwarded to the nearest Foujdari court for trial. The Remembrancer of Criminal Courts was in charge of the department which was to receive and maintain reports from all the Foujdari courts in order to exercise control and supervision over them. Things continued in this way upto 1790.

10. Judicial reforms of Lord Cornwallis

The judicial reforms innovated by Lord Cornwallis constitute the most important contribution to the growth of Indian Legal History. Though he was the Governor General only for about 7 years, still he could afford to introduce reforms in the judicial field in three most important instalments—firstly in 1787, secondly in 1790 and thirdly in 1793. The first instalment was solely prompted by his desire for economy. Sometimes he had to underline economy even at the cost of efficiency. Hence it is no wonder that specially in his first instalment of reform, he was sometimes compelled to take some retrogade steps.[74] For this, of course, Cornwallis was not to blame, in as much as, he was given definite instructions for effecting economy, wherever possible. Some of the important provisions of the scheme of 1787 were like these: The number of districts was reduced from 36 to 23. An English covenanted officer of the Company was appointed as the collector for each of the

73. His title was Daroga. All the officers were Muslim, as it was the state of affairs in India towards the end of the Mughal rule.

74. As the result of a provision made by the Governor Warren Hastings in 1881, the executive and the judiciary were separated; but this separation was annulled by Cornwallis in 1787.

districts. The collector was to be responsible for collection of revenue and trial of revenue cases; he was also to act as the judge of the Maffusil Diwani Adalat and over and above these duties, he was also to act as the Magistrate of the district. Again in addition to the duties of mere arresting and forwarding to the nearest Faujdari Adalat for trial, the Magistrates were asked also to try minor criminal offences according to the scheme of 1787. Thus three distinct jurisdictions were given to the collector, to wit, revenue, civil and criminal, with different hierarchy of courts[75] of appeal for each of these jurisdictions. Reforms in the field of crimial administration of justice were introduced by Lord Cornwallis in 1790. The necessity for the reforms was felt as over-due. The entire existing system of criminal administration was corrupt, inefficient and irregular. Murders, robbery and dacoities were rampant; the judges were ill-paid and the scope of temptation was very wide. According to Sir John Shore, the entire system of criminal law was nothing but a "system of rapine and plunder." Again to use the words of a Magistrate, "Nothing has perhaps more contributed to the continuance, if not increase, of dacoity, than the belief entertained by the inhabitants in general, probably on good grounds, of the corruption prevalent in the provincial criminal courts which if it exists, may be chiefly owing to the scantiness of the principal officer's salary and nothing is of much consequence as to remove such an opinion, for dacoits will certainly continue their depredations as long as they believe that with part of their plunder they can procure their exemption from punishment and no witnesses will ever appear against them when, from the corruption of the judge, they believe that their evidence, instead of bringing the offenders to punishment, will only expose themselves to their resentment and to the risk of losing their lives or propetry."

Again the judges of the Maffusil Foujdari Adalat had immense power—their judgments except in cases involving life or limb taking place at once without any scope for appeal. The time taken in disposing of a case finally was inordinately long, both in the Maffusil Foujdari Adalat

75. The Mal Adalat, the Mafussil Diwani Adalat and the Mafussil Nizamat Adalat were respectively the courts for revenue, civil and criminal administration. The appeals from the Mal Adalat would lie to the Board of Revenue, situated in Calcutta; a further appeal from the Board of Revenue could lie to the Governor General in Council. Again appeals from the Mafussil Diwani Adalat lay to the Sadar Diwani Adalat under certain conditions; appeals from the Sadar Diwani Adalat lay to the King in Council after a certain pecuniary limit. The Sadar Diwani Adalat was to consist of the Governor General and Council, assisted by the Chief Kazi, the Chief Mufti and two Maulavis.

as well as in tbe Sadar Nizamat Adalat. The Magistrate of Dacca gave an instance where a man was detained for more than ten years without any trial. Similar instances were to be found by the Magistrate of Burdwan.[76] "I have been," says another Magistrate, "at this station nearly two years in which time I have apprehended a great number of murderers and robbers, but the Nawab has not to this day thought proper to make an example of any of them, though I have frequently addressed him on the subject."[77] The imperative necessity of re-orienting the whole of the criminal law was fully realised by Cornwallis. He was also further convinced that the prevalent system was a rotten one, partly for the very nature of the criminal law which was essentially based on Muslim jurisprudence and partly for the corrupted and most inefficient method of administration, frequently resulting in punishments—either too severe or too lenient. Some of the principles of Muslim criminal law again seemed to be against the conception of natural justice. It was also sincerely believed by Cornwallis that real prosperity and welfare of the country and the maintenance of law and order could be possible by a strictly systematic administration of criminal law. While writing to Dundas in 1789, Cornwallis says, "The administration of criminal justice is oppressive, unjust and beyond measure corrupt and I see no remedy but by appointing three or four judges for Bengal and Bihar from the Company's senior servants, who should go on the circuit twice a year and superintend the trials and be particularly careful that the sentences should be executed on those who are found guilty and that the innocent should be released. Although this will be attended with the considerable addition of expense, yet whilst we call ourselves sovereigns of the country, we cannot leave the lives, liberty and property of our subjects unprotected."[78]

The new scheme of Lord Cornwallis for reform of the criminal administration was promulgated by the Governor General in Council on December 3, 1790. The most important provision of this scheme was that the Nawab of Bengal was absolutely divested of his control over the administration of criminal law. The power so long residing in the Nawab

76. "It may with truth be asserted that crimes would be but too frequently committed with impunity did not the Magistrate exert his influence to bring the offenders to condign punishment more particularly, as the injured parties when they find they only add to the losses they have sustained by attending the slow process of designed delays in the investigation of the Nizamat courts relinquish all further prosecution considering their hopes of redress as desperate"........... Cornwallis' Minute, Bengal Revenue Consultations, 1790.

77. *Ibid.*

78. Melville Papers.

was placed at the hands of the Governor General and Council. The seat of the Sadar Nizamat Adalat was again taken back to Calcutta from Murshidabad. Exactly like the Sadar Diwani Adalat, the Sadar Nizamat Adalat was to consist of the Governor General and the members of his Council—assisted by the Chief Kazi of the province and two Muftis. The law to be applied was the Muslim law, as modified by the Regulations.[79] The court was to sit at least once a week. Record of the proceedings was to be kept regularly.

Below this Sadar Nizamat were the courts of Circuits[80] that replaced the former Foujdari courts, presided over by the Muslim judges. The provinces of Bengal, Bihar and Orissa were divided into four divisions, namely, Calcutta, Patna, Dacca and Murshidabad. Each of these divisions was further subdivided into several districts. There was a court of Circuit for each of the four divisions. This court consisted of two covenanted civil servants of the Company as judges to be assisted by the Kazi and the Muftis who were to be nominated by the Governor General in Council. The court of Circuit was not fixed at a particular place ; but it was moving from one place to another in the division. After finishing the circuit, each court was to go to the divisional headquarters for the trial of the case thereof. Cases of capital sentence were to be referred to the Sadar Nizamat Adalat. The Magistrates' were the lowest courts in criminal administration. The Magistrates[81] used to hand over the suspected culprits to be tried by the Circuit courts. But in case of minor offences they could try the offenders themselves. The punishments that the Magistrates could inflict for the minor offences could extend upto fifteen rattans or imprisonment for fifteen days. The European British subjects were not ordinarily amenable to the Magistrates and the Circuit courts. To meet this difficulty, the Magistrates had to take oath before a judge of the Supreme Court of Judicature to act as the Justices of the Peace.

79. The procedure followed by the Sadar Nizamat Adalat was that each case presented to it for final decision by the Circuit courts, had to be reviewed by the Chief Kazi and the Muftis. After careful scrutiny they were to state if the Fatwa proposed was in accordance with the evidence and in consonance with the law. The Sadar Nizamat Adalat consisting of the Governor General and Council was to pass final orders.

80. The procedure followed by the Circuit courts also was more or less analogous. The charge against the accused person, the evidence of the prosecution, the defence of the accused person were all to be explained and recorded in presence of the accused person, first by the Kazi and the Mufti who were to give the Fatwa in the record of the proceeding. The final judgment was to be delivered by the Circuit court.

81. The Magistrate was to take oath saying that he would apprehend "murderers, robbers, thieves, house-breakers and other disturbers of peace." On complaint, he used to issue warrant.

Though the new scheme of 1790 was to entail a heavy additional expenditure, still Lord Cornwallis was sincerely convinced that the money will be worth spending. He emphatically expressed his conviction thus : "I need no remark that the strongest conviction of the necessity of these arrangements could alone induce me to propose any addition to them at the present period when our resources are required for the support of a foregoing war. But it is bad economy at any time to withhold the sums requisite for the support of the establishments, necessary for the administration of justice. He was further convinced that once the new arrangements were given effect to under the superintendence of experienced and efficient British officers, "the murders, robberies and other criminal offences will not be more frequent than must necessarily be expected from the vices and passions to which human nature is subject and which under the best regulated Government will always impel some individuals to commit the worst of crimes."

The last but not the least instalment of judicial reforms on the side of civil law was introduced by Lord Cornwallis in 1793. The most important improvement of this scheme was the separation of the executive and the judiciary. But it went still farther. The executive was not only separated from the judiciary, but it was subjected to the jurisdiction of the civil courts. It should be noticed that mainly for the economy of expenditure in the administration, Lord Cornwallis was compelled to re-combine in 1787 the executive and the judicial powers in the collector, avowedly in defiance of the separation that was already effected by Warren Hastings in 1774. But in no time, he had to modify his own conception and he became a champion for cause of separation of the executive and the judiciary in 1793. The arguments were more or less old, but the scheme was quite novel and far-reaching in effect. "As it cannot be supposed that those who are most likely to commit or connive at acts of injustice will afford redress against themselves, nothing can be more preposterous than to give the exclusive cognizance of all disputes between the proprietors and the cultivators of the lands to the collectors of revenue." "I do not hesitate," declared Lord Cornwallis, "to pronounce that whilst this order exists, improvement is not to be hoped for ; and that the Regulations which we are daily framing to promote the cultivation of the country and to raise the value of the landed property will be scarcely known and still less felt by the body[82] of the people." He further goes on to say that "the idea of the......officers of Government of being

82. Cornwallis' Minute, Bengal Revenue Consultations, 1793.

able to commit oppression with impunity must be eradicated. The people will then feel themselves secure in persons and property and a spirit of industry will animate both the manufacturers and the cultivators of the land......"

In the result, the collectors and all the executive officers were not only divested of their judicial powers, but they were amenable to the courts for acts done by them in their official capacity in opposition to the provisions of the Regulations, as it will appear from section 10 of Regulation III of 1793.[83] So far as the jurisdiction of the Diwani Adalats was concerned, there was a very inequitable distinction between the British subjects on the one hand and the native people on the other. The former were entitled to realise all claims against the latter through these courts, but nothing could be done *vice versa.* In order to do away with this anomaly, section IX of Regulation III of 1793 provided that these courts would have jurisdiction over all British subjects, so far as not to allow them to live at a greater distance than ten miles from Calcutta, unless they executed bonds whereby they would be bound to be amenable to the courts, referred to above, in all civil cases not exceeding the value of Rs. 500/-.

Another very important provision, made in 1793, was that the Government was equally subject to the jurisdiction of courts in the same manner as between individuals. The proposal of Lord Cornwallis was that "where Government was a party with its subjects regarding property, it should submit its right to be tried through the medium of its officers in the courts of justice.[84]

83. "Collectors of the revenue and their assistants and native officers, commercial residents and agents and their agents and native officers, employed in the provision of the investment, salt agents, and their assistants and native officers, concerned in the manufacture of salt, the collectors of the customs and their assistants and native officers, employed in the collection of the customs, the mint and assay masters and their assistants and native officers are declared amenable to Zilla or city court in the jurisdiction of which they may reside or carry on the public business to their charge for any acts done in their official capacity in opposition to any Regulation......".

Lord Cornwallis sincerely believed that the above position "will effectually prevent, in future, the tyranny and oppression which has been so frequently exercised throughout the country by native officers, employed in the collection and compel the collectors to adhere strictly to the Regulations and instructions prescribed for their guidance "

84. The preamble ran like this : "Government itself, in superintending these various branches of the resources of the state may be precluded from injuring private property, they have determined to submit the claims and interests of the public in such matters to be decided by the courts of justice according to the Regulations in the same manner as suits between individuals."

According to prevailing arrangement before 1793, there were no intermediate courts of appeal between the courts of the Diwani Adalat and the Sadar Diwani Adalat at Calcutta. So by Regulation V of 1793 four provincial courts of appeal[85] were instituted at Patna, Calcutta, Dacca and Murshidabad. The Diwani Adalats in the District head quarters were very much overworked on account of a large number of cases, both big and small. And the people also had to experience great inconveniences in attending these courts from distant parts of the districts. Hence the necessity was keenly felt for relieving the district courts by taking away the less important cases to be entrusted to some subordinate judiciary—which comprised the Commissioners or the Munsiffs. The preamble of the Regulation passed for this purpose stated as follows: "There being but one established tribunal in each Zilla for the trial of causes, the parties in the most trivial suits wherever they may reside are often obliged to repair in person to the place at which the court is held and to attend on it until the suit is decided. Besides the expense and inconvenience necessarily resulting to the parties themselves from quitting their employments and proceeding to a distance from their habitations, greater hardship is experienced by their witnesses who, notwithstanding they may be uniterested in the issue of the suit, are obliged excepting in particular cases to attend the court in person to the great detriment of their private affairs. In addition to these evils, the numerous petty suits, filed both in the city and the Zillah courts, occupy the greater portion of the time of the judges, protract the decision of causes of more importance and obstruct the general administration of justice. To relieve the courts, as far as may be practicable, from trial of these petty suits, to afford the parties an opportunity of obtaining an adjustment of them, without subjecting themselves or their witnesses to the injurious consequences, above stated, and to expedite the decision of causes of every description."

The institution of Munsiffs was undoubtedly a great boon though it

85. Each such court was to be superintended by three English convenanted servants of the Company. The purpose of instituting these appellate courts was 'that all persons especially the cultivators of the soil, the traders and manufacturers and other classes of the lower and the most industrious orders of the community in the different parts of the provinces who may be dissatisfied with the decisions of those courts should have an appeal to a higher court to which they can have ready access; and that this court should be so constituted that they may look up to it with confidence for speedy redress against unjust and erroneous decisions". The Sadar Diwani Adalat was to hear appeals from the above appellate courts when the value of the disputed property was exceeding Rs. 1000/.

had certain glaring defects. Another court that was provided for by the Regulation of 1793 was the court of Registrar who was a covenanted servant of the Company. The Registrar also was appointed to relieve the Diwani Adalats by trying minor disputes. The judicial reforms of Lord Cornwallis were not confined only to the institution of new courts and appointment of new and efficient judicial officers, he also directed his attention and vigilance to the other aspects of litigation namely court-fee and the legal profession.[86] Court-fees varying from 2 to 5 p.c. were imposed on the litigants in 1787 in order to put a check on litigation by this "indirect taxation." But Lord Cornwallis could clearly see that this taxation[87] was not the proper remedy, as justice was denied to many really deserving persons who could not be in a position to procure the necessary amount of court-fee. The tax in the shape of the court-fees "which the parties were obliged to pay for having justice administered to them debarred many persons from recovering their rights." The number of cases was large not on account of the litigious character of the people, but on account of the "dilatoriness and inefficiency of the administration of justice". These evils according to Lord Cornwallis "could only be remedied by speedy and impartial decisions and punishing the litigants according to the circumstances of the case and not by imposing a fine upon all suitors indiscriminately and then allowing their causes to remain for years undecided." No court-fee was thus to be paid for litigation according to the scheme of 1793.

With the virtual introduction of "the rule of law" the legal profession also assumed a very gteat importance. So long the cases could be conducted either by the parties themselves or by their agents who were never known for their knowledge, honesty and integrity. It was felt by Lord Cornwallis that the legal profession should be put on a sound basis to

86. Regulation VII of 1793 was passed for giving detailed rules for the governance of the legal profession. The lawyers were to be honest, educated and dignified and knowledge of Hindu and Muslim law along with the various Regulations was deemed an essential qualification for becoming a lawyer—who was to take oath for doing his duties faithfully and honestly.

87. In a letter to the Court of Directors, Lord Cornwallis requested to consider the sanction of the arrangement favourably irrespective of the question of cost involved: "These arrangements so important to the prosperity of your affairs will be productive of an immediate additional expense of four lacs of rupees *per annum*............we have not a doubt, but you will think this additional expense well bestowed, when you consider the happiness the arrangements will dispense to the many millions of people who are your subjects, the prosperity it will diffuse throughout your possessions and the stability it will give your government by connecting the interest of the people with its continuance ; we think exclusive of these considerations,

be controlled and supervised by the courts on the strength of sanads to be issued by the Sadar Diwani Adalat. Any pleader, found guilty of promoting or encouraging litigation, of frauds, or of gross misconduct would be suspended. The lawyers were to charge moderate fees according to the schedule, contained in the Regulation. As a safeguard against exploitation by the lawyers, no fee could be realised by them from the clients direct. The lawyers' fee also was to be deposited to the court from which it was to be received by them.

Some special consideration was made for the native law officers—who continued to expound the Hindu law and the Muslim law for the English judges. Their tenure of office also was made secure and they were not liable to be removed from office except on account of misconduct, bad character and inefficiency, proved to the satisfaction of the Governor General in Council who were responsible for their appointment.

The scheme of 1793 was to entail a heavy expenditure which was undertaken by Lord Cornwallis on his own responsibility and initiative. His conviction was clearly expressed thus : "Having during the considerable period that I have presided over their affairs had ample opportunities of observing how inefficient the various arrangements of former Government have proved to establish a system for governing this country conformable either to the liberal and human spirit or the real interests of the British nation. I have considered it to be one of the most valuable services which I could render to the Company to devise remedies for such pernicious defects and to propose that no further time should be lost in applying them............No motive could have induced me to undertake a laborious and complicated arrangement at the close of my administration, but a conviction of its being essential for the national honour and the future prosperity of their dominions." The scheme of Lord Cornwallis was intended for fair, impartial and speedy justice. But it had certain inherent defects as well. After 1793, the whole administration of justice comprising both civil and criminal aspects was rather too elaborate[88] and compli-

it wonld have boen a culpable and even a criminal species of economy and inconsistent with the human and liberal spirit with which the British nation has been actuated with respect to this country, to have withheld from a people from whom we derive so great a revenue such a portion of the public income as is indispensably necessary for the good Government of the country for which we conceive these arrangements to be essential".

88. The whole machinery was highly technical and there was a hierarchy of courts beginning from the courts of the Munsiffs and ending with the Sadar Diwani Adalats. The inter mediate courts were the Zilah Diwani Adalats, the provincial courts of appeal and the Registrar's courts.

cated. Another conspicuous defect of the system was the absence of any role to be played by the Indians themselves[89] in the administration of their own affairs. The foreign judges were unable to understand the law and language and manners and customs of the people without the help of interpreters. This necessitated the appointment of law officers for the administration of justice. The Court of Directors were, however, convinced in no time about the desirability of employing more and more Indians in the administration of the country. "When the talents of the more respectable natives can with propriety and safety be employed in the management of the country, we think it both just and politic to carry that principle into effect.........We do not hesitate to declare as a leading feature of our future system that the multiplication of British subjects in the interior districts or in the subordinate detail of Indian offices is not necessary to good Government nor productive of any benefit to the Company adequate to the vast expenses attending it. We conceive also that the natives in general are most competent to the duties of detail in that climate and in fact have always conducted the laborious parts of them."

11. Post-Cornwallis judical reforms

The judicial structure that was laid down by Lord Cornwallis was altered and improved by his successors according to the exigency of the situation. The first discouraging feature that had to be met by Sir John Shore was an undisposed accumulation of judicial work. An idea of this melancholy state of things can be had from what the collector of Burdwan wrote on March 17, 1795: "I have reason to believe that the whole number of suits now undecided in the Adalat of this district will be found to be not less in number than thirty thousand and that half this accumulation of business in arrear has taken place, in the course of about nine months...... It follows, therefore, that a man who at this time files a bill in the Diwani Adalat, and provided his cause brought to decision in regular rotation, cannot look for redress of his injury to be afforded him in less than eight years; and that a man who at the end of that period, should file a bill could have no very good prospect of its being brought to decision in the whole term of life; and moreover that the number of plaints pending at the end of every year would be found still accumulating in a ratio which would ultimately prolong the prospect of decision, beyond any assignable limit and thereby destroy

89. Lord Cornwallis laboured under a misconception that the Indians were not worthy of trust and confidence. He, therefore, deliberately excluded the Indians from the administration.

the purposes of an Adalat altogether."[90] The Government of Sir John Shore complacently believed that the accumulation of suits was only a passing phase and that "when the different tribunals are established in full exercise of their powers, the suits now pending will soon be brought to a determination and in future causes will be decided with all expedition necessary to give full effect to the principles of the Regulations."[91] Desperate attempts were no doubt being made to remove the congestion, but the procedure that was adopted was not wholly correct. Sir John proceeded on certain wrong hypotheses. The lack of court-fee and the litigious character of people were supposed to be some of the reasons for the increment in the volume of the work. But these arguments were fallacious. In 1794 some rules were, however, made according to which the judge of the Diwani Adalat was empowered and directed to refer to the Registrar more cases for trial.[92] Court fees were again to be imposed. The Government argued as follows: "No expense attending the institution of suits in the first instance; and the ultimate expense being moderate and limited, whatever length of time the suits may be pending; and no fee whatever being charged on the exhibits and papers, filed in the courts nor on petitions, presented in the courts not immediately forming part of the proceedings in any suit under trial; many groundless and litigious suits and complaints have been instituted against individuals and the trials of others have been protracted, by the filling of superfluous exhibits or the summoning of witnesses whose testimony was not necessary to the development of the merits of the case. The business in many courts of judicature has in consequence increased so as to prevent the judges from determining the causes and complaints filed with that expedition which is essential for deterring individuals from instituting vexatious claims or refusing to

90. Fifth Report, 1872, Bengal App. No. 6.

The Zemindar of Bishenpore also wrote to the Government: "The causes which were instituted in the Adalat for the enforcement of demands of rent last year and before that time lie undecided and the renters of the present year are prepared to avail themselves again of the same delay, by withholding payments of the rents and thereby compelling me to have recourse to the Adalat; for these people observing that the demands long standing which were long since submitted to the Adalat are not yet enforced, they say to themselves, recourse was had to the Adalat in the past to make us pay our rents, but nothing has been effected against us. Why, therefore, should we fear to withhold the dues of the present year? We cannot be forced to pay without orders from the Adalat and have nothing to fear for the present"... *Ibid.*

91. *Ibid.*

92. All cases could be tried by the Registrar, if the value did not exceed 200 sicca rupees. The Registrar also was asked to sit thrice a week for judicial work. Again the decisions of the Registrar upto Rs. 25/- were to be final. In all appealable cases, the appeals were to lie direct to the provincial courts of appeal instead of to the Diwani Adalat.

satisfy just demands and for giving full effect to the principles of the Regulations."

The re-imposition of court-fees was unequivocally condemned by the different courts.[93] The judge of Midnapore observed, "Litigation may possibly have been checked by fees and stamps, but I confess I consider the charge too high. It will not, I imagine, be denied that it is desirable that the least tedious and the least expensive mode of obtaining redress, should be open, where an injury has really been suffered. When a poor man has been oppressed, he should be freed from the trouble and expense and assisted and encouraged, as far as possible, in prosecuting his complaint. He is not in such a situation a fair object of taxation.[94] It does not become the ruling power to add to his misfortune, by levying impositions upon him. It is clear that a ryot from whom an increase of rent has been exacted and instituting a suit for the same must feel the charge of stamps and fees to be a severe aggravation of his distress; nor can he console himself under the reflection that the impositions are intended to check litigiousness; or that for certain reasons of finance, it is expedient he should submit to new exactions. The expense and delay to which ryots are subject in prosecuting their suits are to my knowledge excessive...... It must, I am sure, constantly happen that a ryot gives up his prosecution in despair on finding the expense of continuing it beyond his power to sustain. It is not the original fee on the institution of the suits but the subsequent charges on exhibits and witnesses that appear to me intolerable. I have seen a suitor when stripped of his last rupee and called upon for the fee on a document produce in court a silver ring or other trinket and beg that it might be received as a pledge; and after all perhaps he was cast for money to bring proof. I confess I think such scenes in a court of justice are unpleasant to those who are entrusted with the administration of the laws and not very creditable to Government."

Though Warren Hastings and Lord Cornwallis were responsible in different degrees for the separation of the executive and the judiciary

93. The Murshidabad court of appeal remarked : "The increased expense of law suits has never been found to check litigiousness. On the contrary, it has been generally observed that litigation is encouraged thereby in the hope that the certainty of expense added to the uncertainty of result might deter parties from defending even just rights. On comparing the half yearly reports of the several Adalats in this division, it does not appear that the number of suits filed since the establishment of the fee paid to the Government on the institution of suits, of the fees paid on exhibits in the courts of judicature and of the stamp duties differs much from the number filed in a similar period previous thereto."

94. The second Law Commission recommended the abolition of court-fee in 1856; but this recommendation was not given effect to.

till at the last resort the Governor General and Council were clothed not only with the executive and judicial authority, they had also the legislative authority. Wellesley planned to take out the judicial powers for the Governor General and Council to be vested in judges who would be independent of and separated from the executive and the legislative organs of the Government. Several arguments were advanced by Wellesley for this purpose.[95] The most important provisions were thus made by Regulation III of 1801 : In the first place, the Sadar Diwani Adalat was to be presided over by three judges ; in the second place, the Chief Judge was to be appointed by the Governer General in Council from among the members of the Council. The Governer General or the Commander-in-Chief could never be eligible for the post of the Chief Judge. In the third place, the other two judges were to be appointed from among the covenanted servants of the Company. In the fourth place, the Chief Judge and the puisne judges were to constitute both the Sadar Nizamat Adalat as well as the Sadar Diwani Adalat. In 1805 Lord Cornwallis became the Governor General for the second time and led the doctrine of separation of the executive and the judiciary to its logical conclusion, when he enacted that the Chief Judge of the Sadar Adalats was no longer to be a member of the Council. This innovation was, however, reversed and a retrogade step was taken in 1807 when it was provided by Regulation XV, among other things, that the Chief Judge shall be a member of the Supreme Council. The sounder policy of 1805 was re-adopted in 1811. The Regulation of 1807 had already increased the number of judges from three to four. But the Regulation XII went further and provided that the number of judges could be increased "according as may from time to time appear necessary for the despatch of the business of those courts." In 1814 the Government came to the right conclusion that such persons also "who have been previously employed during sufficient periods in the discharge of judicial functions should be hereafter appointed to the office of judge in the Sadar Diwani Adalat and the Nizamat Adalat." In pursuance of this policy, it was laid down expressly in Regulation XXV that "no person shall be deemed qualified to be appointed to the office of a judge of the Sadar Diwani Adalat and the Nizamat Adalat, unless he shall have previously officiated as judge of a provincial court of appeal or of a court of Circuit for a period of not less than three years or unless he shall have been previously employed in the judicial department or in offices requiring the discharge of judicial

95. Lord Wellesley's despatch to the Court of Directors, dated July 9, 1800.

functions whether of a civil or criminal nature for a total period not being less than nine years." These arrangements continued from 1814 upto 1862 when the Sadar Courts were merged in the High Court of Judicature at Fort William in Calcutta under the High Courts Act of 1861.[96] Lord Hastings expected that the legal reforms introduced by Lord Wellesley would be sufficient to relieve the congestion which resulted in "almost incredible number of causes undecided." In this connection the comment made by Court of Directors in 1812 is very significant.[97] The select Committee of the House of Commons suggested that the native Commissioners "may be indefinitely increased in number at no expense to the state" in as much as "an augmentation of the number of European judges, adequate to the purpose required, would be attended with an augmentation of charge which the state of finances is not calculated to bear." This plea of inadequacy of fund for the administration of justice was vehemently criticised by Mill.[98] However Lord Hastings gave concrete shape to the suggestions of the Committee by increasing the number of the Munsiffs and the Sadar Ameens[99] and widening their jurisdiction. As a matter of fact the Regulation XXIII of 1814 was passed primarily with this end in view. In the administration of criminal justice there was inordinate delay. Hence

96. In 1803, Lord Wellesley made attempts to improve the adminisiration of justice by creating new types of court and increasing the number of the old types of court already prevalent. Thus the courts of Assistant Judges could be established according to the needs of the districts again according to the necessity, the courts of Sadar Ameens also be created in the Zillahs. The Munsiffs were no longer to be appointed from the landlords etc. Education and ability also were insisted upon. The powers of the Registrar's courts also were widened.

97. "We should be sorry that from the accumulation of such arrears there should ever be room to raise a question whether it were better to leave the natives to their own arbitrary and precipitate tribunals than to harass their feelings and injure their property by an endless procrastination of their suits under the pretence of more deliberate justice."

98. "Never since man had the use of language was a more terrible condemnation on any Government pronounced of all the duties of the Government that of maintaining justice among the people is the foremost. This is in fact the end for which it exists. Here is said to be a Government which raises upon the people a revenue so vast that by avowed intention it is all that they can bear ; that is oppressive to the highest pitch which oppression can reach without desolating the country ; till not a sufficiency remains to hire judges for the distribution of justice. What is made of all this money? To what preferable purpose is it applied ? High matter in large quantity would be contained in a proper answer to these questions."

99. The Sadar Ameens were not originally salaried officers : They used to be paid on commission basis. Lord Amherst provided by Regulation XIII of 1824 that fixed allowance should be paid to the Sadar Ameens.

inspite of the reforms introduced by Lord Cornwallis by his plan of 1790, things were highly deplorable. The reasons were not far to seek. It was rightly noticed by the Committee of House of Commons in 1812 that there was "delay in the administration of criminal justice in some of the districts arising from another cause which is of more pernicious tendency than experienced by those committed for trial; in as much as it affects those against whom no evidence has yet been taken and may, therefore, involve the innocent as well as the guilty......The evil seems to arise from the European civil servant."[100] The absence of native officers in the administration of criminal justice was a glaring defect which was condemned by the English servants themselves.[101]

In 1821 an innovation was made which had immense effect on the whole machinery of the British adminisration of India. According to the plan of Lord Cornwallis Magisterial powers were conferred on the Diwani judges and they came to be known as Judge-Magistrates. But according to the scheme of Lord Hastings magisterial powers were given to the collector and they came to be known by the designation Collector-Magistrates.[102] After this innovation the collectors and not the judges became the principal officer in the district. The grounds of Lord Cornwallis were sufficiently clear. Magisterial or judicial power given to the collectors might lead to harassment and oppression on the part of tenants. But these arguments did not seem to have any weight with Lord Hastings. Of course, according to the plan of Lord

10C. The Magistrate of Midnapore expressed himself on the point thus: "Another impediment......is to me too palpable to be over-looked, I mean that arising from Europeans in our situation, being necessarily ill-qualified in many points to perform the duties required of us as judges and magistrates. Nothing is more common even after a minute and laborious examination of evidence on both sides for the judges to be left in utter doubt respecting the point at issue. This proceeds chiefly from our imperfect connection with the natives and our scanty knowledge after all our study of their manners, customs and language......I am inclined to think that an intelligent native is better qualified to preside at a trial than we can ever be ourselves."

101. The judges of the Calcutta Court of Circuit confessed: "We cannot study the genius of the poople in its own sphere of action. We know little of their domestic life, their knowledge, conversation, amusements, their trades and castes or any of those national and individual characteristics which are essential to a complete knowledge of them. Everybody affords us examples of something new and surprising and we have no principle to guide us in the investigation of facts except an extreme diffidence of our opinion a consciousncss of inability to judge of what is probable or improbable......"

102. The preamble or Regulation IV of 1821 is very significant on this point.

Hastings,[103] the relevant Regulation. (IV of 1821) was only permissive; but the policy initiated by him was furthered by Lord William Bentinck.

12. Bentinck's judicial reforms

Lord Bentinck was responsible for many wholesome judicial reforms in the rapidly changing conditions—both economic and political—of the administration of the Company. In many respects the reforms of Lord Bentinck were more far-reaching in effect and vouchsafed greater efficiency within quite reasonable pecuniary limits, specially in view of the augmentation of the native elements in the administration of justice in the country.

The most conspicuous reform of Bentinck was the establishment of the Court of Sadar Diwani Adalat and Sadar Nizamat Adalat at Allahabad from January 1, 1832. This step was imperatively necessitated in view of the Company's control over some ceded and conquered territories of Banaras[104] and Oudh.[105] These provinces were originally under the Sadar Diwani and Sadar Nizamat Adalats of Calcutta. The difficulties and inconveniences of these far-off North Western provinces were quite apparent. The establishment of the new courts at Allahabad gave a great relief to people who would otherwise be compelled to come to Calcutta for pursuing their legal matters. The augmentation of the native elements in the judiciary was another very striking improvement, effected by Lord

103. Lord Hastings was responsible for another innovation. It was he who for the first time entrusted the administration of criminal justice to the native law officers and the Sadar Ameens to try and determine such cases, as referred to them by a Magistrate. The powers of the Magistrates also were highly enhanced : They could sentence upto two years of imprisonment with hard labour and inflict corporal punishment not exceeding thirty stripes.

104. The judicial system prevalent in Bengal, Bihar and Orissa in 1790 was introduced in Banaras in 1795 by the Governor General in Council at Calcutta, with the concurrence of the Raja of Banaras. The province of Banaras was divided into four districts, namely, Banaras, Mirzapur, Gazipur, and Jaunpur. Courts were established in these districts on the model of the courts in Bengal, Bihar and Orissa. The provincial court of appeal was established at Banaras.

105. The Nawab Vizeer of Oudh granted to the Company on November 20, 1801, in perpetuity, the sovereignty over a large territory within the subadary of Oudh. These were known as the ceded districts of Oudh wherein the judicial system of Bengal was introduced on March 24, 1803. This territory was divided into seven districts, namely, Moradabad. Bareilly, Etwah, Furruckabad, Cawnpore, Allahabad and Goruckpore. Meerut, Shaharanpore, Muzaffarnagar and Bulandshehr also were within the jurisdiction of Allahabad.

Bentinck. The native judicial officers[106] had already given a very good account of themselves. Hence the Court of Directors also were anxious that "when the talents of the more respectable natives can with propriety and safety be employed in the management of the country, we think it both just and politic to carry that principle to effect." They proposed that "the native functionary must be multiplied, so that they might be able to dispose of all civil suits in the first instance, without regard to the amount" and also that they should be granted adequate allowances.[107] That Lord Bentinck was wholly agreeable to these suggestions is quite clear from what he wrote to the Court of Directors : "A more extended recourse to native agency for the disposal of judicial business has been so earnestly, repeatedly and so recently urged by your Hon'ble court, that I should almost have deemed it my duty to give effect to your injunction, inspite of any local obstacles which have opposed themselves. But concurring, as I do, most cordially, in the wisdom, the justice and the sound policy of these injunctions and being fully satisfied that native probity and talent may immediately be found, if due caution be observed in the selection of instruments in sufficient abundance, to justify the present introduction of the system, I should have deemed myself criminal had I any longer delayed to concede to the people of this country a measure so solemnly calculated to facilitate their access to justice ; to reconciliate their attachment and to raise the standard of the moral character." In the result, it was enacted by the 87th clause of the Charter Act in 1833 that "no native, nor any natural born subject of His Majesty, resident therein, shall by reason only of his religion, place of birth, descent, colour or any of them, be disabled to hold any place, office, or employment, under the said Comany." According to the plan of Lord Bentinck the courts were re-modelled[108] as follows : The Munsiffs, the Sadar Ameens,[109] princi-

106. The judge of Midnapore appreciated the works of the Munsiffs thus : "They sit from morning till night on a mat, under a shed or hut or in the porch of a house and attend to every petty dispute of a ryot with a degree of patience, of which we have no idea, till they develop the merits and decide the suit." In 1801, the Munsiffs disposed of 378233 cases including cases compromised by the parties before them.

107. The Court of Directors observed, "It is nevertheless essential to this result in India that the natives, employed by our Government, shall be liberally treated, that their emoluments shall not be limited to a bare subsistence, whilst those allotted to the Europeans in situations of no greater trust and importance enable them to live in affluence and acquire wealth. Whilst one class is considered as open to temptation and placed above it, the other without corresponding inducement to integrity, should not be exposed to equal temptation and be reproached for yielding to it."

108. The jurisdiction of the Munsiffs, for example, was considerably extended so that they were competent to decide all civil suits not exceeding Rs. 300/-.

109. They were Indian judges competent to try civil cases upto Rs. 5000/- on reference made by the Diwani Adalat,

pal Sadar Ameens, the Zilla and city Adalats and the Sadar Diwani Adalats. The provincial courts of appeal were abolished.[110] The criminal administration also was strengthened by the appointment of Indians as Magistrates. The Act XV of 1843, enacted during the administration of Lord Ellenborough, made provision for appointing Deputy Magistrates and Deputy Collectors to be appointed on un-covenanted basis from the Indians. So far as the revenue jurisdiction was concerned, Regulation V of 1812 provided that a Zemindar could distrain the property of his tenant for the realisation of his rent. These cases were to be tried summarily by the Collectors. The aggrieved party, of course, could bring a regular suit in the Diwani Adalat, if it was not satisfied with the judgment of the Collector. As the result of the Regulation VIII of 1831, rent and revenue cases were to be disposed of summarily by the Collectors to facilitate the collection of Government revenue. The provision was responsible for great hardship on the part of the tenants. Again by Act X of 1859, passed by the Governor General in Council, all revenue cases were placed within the jurisdiction of the Collectors and the civil court was made incompetent to hear revenue cases. Provision, of course, was made for appeals that could lie to the Commissioners from the summary judgments of the Collectors. But this was modified and the jurisdiction of the civil courts was again recognised by Act III of 1869.

13. Regulation and Non-Regulation provinces

Bengal, Bombay and Madras came to be known as the Regulation provinces, as they were governed both regarding general and judicial administration by Regulations, enacted from time to time. But generally the three original presidencies began to be expanded with the expansion of the Company's territories. Originally these new territories were to be annexed to the three presidencies for their administration and regulation; but when there was still greater expansion of the Company's possessions, it became well-nigh impossible to govern them through the administrative organs or the instruments of the three provinces. These additional territorial acquisitions came to be described as Non-Regulation provinces, in as much as, the provision of the Regulations was not to be made applicable to them. The most important of these Non-Regulation provinces were those of the Punjab, Assam, Oudh and the Central Provinces. The judicial system that was originally introduced and experimented in the province of

110. The Sadar Diwani Adalat was the ultimate court of appeal and it was presided over by English judges. Moreover the European functionaries were enabled by Regulation VI of 1832 to utilise the services of respectable natives in the administration of justice who could act as panchayats, assessors or jury.

Bengal, Bihar and Orissa was, sooner or later, more or less essentially in the same form, introduced in the other two Regulation provinces of Bombay[111] and Madras[112] as well. There was a fundamental point of difference between the governance of the Regulation and the Non-Regulation provinces. The latter was originally to be administered by the Governor General in Council in their executive capacity, under the general principles of the constitutional law in connection with "conquered and ceded territories." The judicial system of the Regulation provinces was not all at once introduced in the Non-Regulation provinces, where the District officer was given all executive, judicial and magisterial powers for their governance. Every thing depended entirely on the discretion of the District officers. Hence much of the administration in the Non-Regulation provinces was characterised by the whims, personality and imagination of the District officers. The anomalous position of the rules for the governance of the Non-Regulation provinces was regularised for the first time by the Council Act of 1861.[113] The system of adminisration in the Non-Regulation provinces had certain palpable and glaring defects. The methods followed for administration of justice was rough, irregular, summary and executive in nature. Hence it was disliked by every body. Sir James Stephen in 1872 advocated very strongly for the equalisation of the Regulation and the Non-Regulation provinces in the sphere of administration of justice. In the result, the judicial system of the

111. The Government of Bombay was subordinate to that of Bengal and it introduced the system of Adalat in 1799, on the model, devised by Lord Cornwallis. There was one important step taken in 1827 when all the Regulations were replaced by a fresh code of Regulation, still on the model of the plan of Cornwallis. Further changes were effected in the provisions of the civil administration by Regulation XVIII of 1831 and Regulation XXIV of 1836 which enlarged the jurisdiction of the different native officers and changed their official designation. The administration of criminal law also was modified by abolishing the courts of Circuit whose jurisdiction was transferred to the Zilla judges who came to be known as the Sessions Judges.

112. The Government of Madras also was under that of Bengal ; by Regulation II of 1802, a Diwani Adalat was created in each of the districts with four provincial courts of appeal to hear appeals from these Diwani Adalats. The system of criminal administration was the same as in Bengal. By Regulation III of 1807, the the Governor of Madras ceased to act as the Chief Judge. The courts of village Munsiffs and village Panchayats were created by Regulations IV and V of 1816. Regulation III of 1833 enlarged the jurisdiction of the Registrars, Munsiffs and the Sadar Ameens. Act VII of 1843 thoroughly re-organised the system of civil administration and Regulation of 1816 also made some amendments in the criminal administration.

113. Vide section 25 of this Act. And also Act 39 and 40 George III, C.I. XXIX.

Regulation provinces were sooner or later introduced in the Non-Regulation provinces also.[114]

14. The creation of the Indian High Courts and after

The Indian High Courts Act of 1861 marks one of the most important stages of development in the judicial system of the country. This Act was passed on August 6, 1861, shortly after the termination of the Company's rule in India. As the result of the Sepoy Mutiny, in 1858, the Government of Indian territories was taken over by the English Crown. Up to 1861, there were two different sets of courts functioning in India. One such set consisted of the Supreme Courts which were "Crown courts" and the other set comprised the courts which were known as the Company's courts. These two types of courts being different regarding constitution and jurisdiction, gave rise to many inconveniences for the efficient administration of justice. The most glaring disadvantages were the invidious racial discrimination[115] *as well as the quality of the justice*

114. The judicial system of the Non-Regulation provinces was highly unsatisfactory both to the people and the authority and specially after the enactment of the Civil and the Criminal Procedure Codes, when the appellate courts were insisting on strict observance of the rules of procedure. The quality of judicial work could not be expected from the executive officers. In the result, the Punjab Courts Act re-modelled the civil courts of the Punjab; similarly the Oudh Civil Courts Act of 1879 abolished the Non-Regulation system in Oudh; the Chief Court of the Punjab and the Judicial Commissioner's Court at Nagpur were replaced by the Lahore High Court and the Nagpur High Court in 1919 and 1936 respectively. The Oudh Chief Court was amalgamated with the Allahabad High Court in 1948.

115. Racial discrimination was a necessary evil of the British judicial system introduced in India, in different instalments, at different stages of progress. The evil began from the very beginning of the Company's settlement in India, when Sir Thomas Roe secured from the Emperor Jahangir freedom of the English settlers to be governed by their own law. The difference was actually perpetuated and accentuated on account of the growing political power and importance of the Company. Originally the British born subjects were not amenable to the jurisdication of the Company's courts. They could be tried only by the Crown courts in Calcutta, Bombay and Madras. According to the plan of Cornwallis, in 1793, the British subjects could be allowed to live beyond ten miles from Calcutta only on condition that they would execute bonds making themselves liable to the jurisdiction of the Diwani Adalats in cases upto Rs. 500/-. The Munsiffs and Sadar Ameens could not claim jurisdiction in cases where one of the parties was European or American. In 1827, the Government obliged some British subjects in the Mafussil who voluntarily wanted to submit to the courts of the Sadar Ameens by passing Regulation IV of the same year. This provision was reversed by Bentinck in 1831, when all kinds of native judges were again prohibited to adjudicate any case with British subjects as parties. The first Law Member, Lord Macaulay, was against any discrimination on the ground of race of the peoples and he was in favour of one uniform system where all native and British subjects were to be equally amenable to all types of courts except only that of a Munsiff. This point was emphasised by Macaulay in these words: "The chief reason for preferring the Sadar Court is this that it is the court which we have provided to administer justice in the last resort to the great body of people. If it is not fit for that

administered in these courts. It was justly observed by Sir Charles E. Grey, the Chief Judge of the Supreme Court of Calcutta in 1829, that "there is an utter want of connection between the Supreme Court and the Presidency courts and the two sorts of legal processes which are employed by them. Lamentable as it is, that such a feeling should exist, the exercise of the powers of the one system is viewed with zealousy by those who are connected with the other......"[116] The immediate effect of the establishment of the High Courts was the abolition of the long standing differences between the Crown courts and the Company's courts. These differences were responsible for lack of uniformity and harmony in the administration of justice in the country. According to the Act of 1861, each High Court was to consist of one Chief Justice and not more than fifteen puisne judges ; at least one-third of these judges including the Chief Justice were to be Barristers of not less than five years' standing and not less than one

purpose, it ought to be made so. If it is fit to administer justice to the body of the people why should we exempt a mere handful of settlers from this jurisdiction ?.........There certainly is—I will not say the reality—but the semblance of partiality and tyranny in the distinction made by the Charter Act of 1813. That distinction seems to indicate a notion that the natives of India may well put up with something else than justice or that Englishmen in India have a title to something more than justice. If we give our own country men an appeal to the king's courts in cases in which all others are forced to be content with the Company's courts, we do in fact cry down the Company's courts. We proclaim to the Indian people that there are two sorts of justice, a coarse one which we think good enough for them and another of superior quality which we keep for ourselves. If we take pains to show that we distrust our highest courts, how can we expect that the natives of the country will place confidence in them ?" Act XI of 1836 did away with the discrimination provided for by section 107 of the Charter Act of 1813. The Britishers raised a storm of protest and described the legislation as the "Black Act." The position was more or less the same in Bengal, Madras and Bombay. Even the Munsiffs' courts in Bengal and Madras were entitled to have jurisdiction over the British from 1843 and 1850 respectively. In the sphere of criminal law, the racial discrimination continued for a longer time and was revised from time to time. Thus Regulation II of 1796 made all Magistrates in Bengal Justices of the Peace and they were empowered to apprehend all British subjects to be committed to the Supreme Court at Calcutta for trial. In 1813 the Charter Act gave some additional power to the Magistrates in the Mafussil. In 1872, the amended Criminal Procedure Code also retained the discrimination. The Indian judges and magistrates could not try Europeans in the Mafussil. Lord Ripon proposed that all District Magistrates and Sessions Judges were to be entitled to try Europeans along with the natives. This was also vehemently opposed by the European community. The Ilbert Act passed in 1884 made provision for trials of Europeans by a mixed jury which was to consist of a majority of Europeans and Indians for trying European and Indian offenders respectively. However, the last remnant of racial discrimination in criminal law was abolished by Act XVII of 1949. This Criminal Law (Removal of Racial Discriminations) Act completed what remained incomplete after the Act XII of 1923.

116. Appendix V to the Report on the affairs of the East India Company 1832, p. 75.

third of the covenanted civil servants of the Company and the remaining judges could be taken from amongst the Barristers who were not of less than five years' standing, civil servants of at least ten years' standing having worked at least for three years as District judges, persons serving as principal Sadar Ameens or judges of the Small Cause Court for at least five years and pleaders of Sadar Courts or the High Courts of at least ten years' standing. The judges were to hold office during His Majesty's pleasure. The Supreme courts, the Sadar Diwani Adalats and the Sadar Nizamat Adalats were abolished after the establishment of the High Courts in Bengal, Bombay and Calcutta. These High Courts had both original and appellate jurisdiction in all matters—civil, criminal, admiralty, testamentary, intestate and matrimonial. The process of establishing High Courts in India which began in 1861 continued for a long time thereafter[117]—with more or less similar constitution and jurisdiction. According to the constitution of India, almost in each state[118] there exists a High Court which is the highest court of appeal and revision within the state. Besides these High Courts there are other civil and criminal courts of subordinhte jurisdiction. These subordinate courts are constituted and function by the provision made by the State Legislature. Last of all come the village panchayats. The jurisdiction of the King in Council to hear appeals from the courts in the king's dominions is based on the king's prerogative according to which he is regarded as the fountain of justice, implying thereby "the inherent prerogative right and on all proper occasions, the duty of the Queen in Council to exercise an appellate jurisdiction with a view not only to ensure as far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally."[119] A right to appeal to

117. The High Court at Agra was originally established in 1866 for the North Western Provinces. The High Court of Patna was established in 1916. The High Court of Lahore was created by the Letters Patent, issued on March 21, 1919. The original Chief Court of the Punjab established by Act XXIII of 1865 was raised to the status of the High Court. The High Court at Lahore for all practical purposes resembled that at Allahabad. These High Courts had no ordinary civil jurisdiction or Admiralty or Vice-Admiralty jurisdictions. The Patna High Court, however, had the Admiralty jurisdiction like the Calcutta High Court. The High Court at Nagpur was established by the Letters Patent, issued by George V on January 2, 1936. After the partition, a separate High Court was established for East Punjab virtually on the same line as the original Lahore High Court. The year 1948 was, however, destined to witness the establishment of two other High Courts for Assam and Orissa Further addition also was made from time to time.

118. Some states have courts of Judicial Commissioners which enjoy the same status as High Courts. Re-organisation of the states has introduced further changes.

119. Reg V Bertrand (L.R.T. P.C. 520).

the King in Council was first granted in 1726, when the Mayor's courts were established in the presidency towns of Calcutta, Bombay and Madras. Appeals from the Mayor's courts lay in the first instance to the Governor and Council and in cases involving matters exceeding 1000 pagodas, the final appeal lay to the King in Council[120] from the decisions of the Governor and Council. The Mayor's court at Calcutta was replaced by the Supreme Court of Judicature in 1774. From the judgments of the Supreme Court also an appeal could lie to the King in Council. From the decisions of the Sadar Diwani Adalat, appeal could lie to the Governor General in Council whose decision was to be originally final. In 1781, however, provision was made *inter alia* that appeals from the decisions of the Sadar Adalat in civil matters could lie to the King in Council when the subject matter in the suit exceeded £ 5000, The defects of the functioning of the Privy Council and its importance were thus characterised by Lord Brougham in his famous speech on the reform of English law: "They determine not only upon questions of colonial law in plantation cases but also sit as judges in the last resort of all prize causes. And they hear and decide upon all our plantation appeals. They are thus made the supreme judges in the last resort over every one of our foreign settlements, whether situated in those immense territories which you possess in the East, where you and a trading Company rule together over not less than 70000,000 of subjects—or established among those rich and populous islands which stud the Indian Ocean and from the great Eastern Archipelago—or have their stations in those lands—part lying within the tropics, part stretching towards the pole, peopled by various castes, differing widely in habits still more widely in privileges, great in numbers, abounding in wealth, extremely unsettled in their notions of right and excessively litigious, as all the children of the new world are supposed to be, both from their physical and political constitution. All this immense jurisdiction over the rights of property and person over rights political and legal and over all the questions growing out of so vast and varied a province, is exercised by the Privy Council unaided and alone. It is obvious that from the mere distance of those colonies and immense variety of matters arising in them, foreign to our habits and beyond the scope of our knowledge any judicial tribunal in this country must of necessity be an extremely inadequate court of review. But what adds incredibly to the difficulty is that hardly any two of the colonies can be named which have the same law; and in the greater number, the law is wholly unlike our own. In some settlements it is the Dutch law, in

120. Appeals to the King in Council were of two kinds: (1) Appeals as of right and (2) appeals by special leave of the king.

others the Spanish, in other the French, in others the Danish. In our Eastern possession, these variations are, if possible, greater; while one territory is swayed by the Mahomedan law, another is ruled by Hindu law; and this again in some of our possessions is qualified or superseded by the law of Buddha; the English jurisprudence being confined to the handful of British settlers and inhabitants of the three Presidencies."

Originally the Indians could not take any very great advantage of the Privy Council, as the procedure to be followed there was quite unfamiliar to them and the distance and the means of communication also had their own difficulties. The first Indian appeal to the Privy Council was preferred from Bengal in 1799. At one time it was discovered that many cases were lying undisposed of in the Privy Council, as they were not being pursued. Regarding the constitution and procedure of the Privy Council, laws were made from time to time. The act of 1833 provided for the appointment of two retired Indian judges as assessors to the Privy Council. Though this provision did not prove of much practical utility, still the position was much improved in 1908, when by the Appellate Jurisdiction Act it was provided that "if any person being or having been Chief Justice or judge of any High Court in British India is a member of His Majesty's Privy Council, he shall, if His Majesty so directs, be a member of the Judicial Committee." The number of such members could not exceed two at one time. In the famous case of Hull V Mckenna, the procedure of the Privy Council appeals was very nicely described by Lord Haldane: "We are not Ministers in any sense; we are a Committee of Privy Councillors who are acting in the capacity of judges, but the peculiarity of the situation is this: It is a long standing constitutional anomaly that we are really a committee of the Privy Council giving advice to His Majesty, but in a judicial spirit. We have nothing to do with policies or party considerations; we are really judges, but in form and in name we are the Committee of the Privy Council. The Sovereign gives the judgment himself and always acts upon the report which we make. Our report is made public before it is sent up to the Sovereign in Council. It is delivered here in a printed form. It is a report as to what is proper to be done on the principles of justice and it is acted by the Sovereign in full; so you see, in substance what takes place is a strictly judicial proceeding." The Privy Council undoubtedly played a very important role in the development of Indian laws in general and the Hindu law in particular. In the words of Dr. Tek Chand, "The Privy Council has been a great unifying force in the judicial administration of this country and I would like to express our high appreciation of the work which it did. At a time when there were no Indian judges in the

High courts and when the number of Indian lawyers was very limited, the Privy Council unravelled the mysteries of Hindu Law, it enunciated the principles of Mahomedan law and formulated with clarity the customs which were prevalent in this country. The Lordships of the Privy Council have from time to time elucidated the various Indian laws with absolutely detached mind. They have laid down the principles on which the judicial administration of the country was based. No doubt there have been lapses and mistakes, occasionally, but on the whole the Privy Council[121] has been a great unifying factor and on many occasions has reminded the courts of the country of those fundamental principles of law on which the administration of justice of criminal matters is based.........."

According to the Government of India Act, 1935, a Federal Court was established in India having exclusive original jurisdiction in cases between the federation and its constituent units, advisory jurisdiction[122] and appellate[123] jurisdiction of a limited character. Appeals from the judgments of the Federal Court could lie to the Privy Council when these judgments were given by the Federal Court in the exercise of its original jurisdiction or in any other case, by leave of the Federal Court, to His Majesty in Council.

In anticipation that the new Republican Constitution of India would come into force from January 26, 1950, the Act of 1949 was passed by the Constituent Assembly of India which provided for the abolition of the

121. On the occasion of the abolition of the jurisdiction of the Privy Council, Shri K. M. Munshi rightly observed : "The British Parliament and the Privy Council are the two great institutions which the Anglo-Saxon race has given to mankind. The Privy Council during the last few centuries has not only laid down law, but co-ordinated the concepts of rights and obligations throughout all the dominions and colonies in the British Commonwealth. So far as India is concerned, the role of the Privy Council has been one of the most important. It has been a great unifying force and for us Indians, it became the instrument and embodiment of the rule of law, a concept on which alone we have based the democratic institutions which we have set up in our constitution."

122. The Governor General could refer any legal question of public importance for its opinion.

123. Appeals could lie to the Federal Court from judgement, decree or final order of a High Court provided the High Court certified that the case involved a substantial question of law regarding the interpretation of constitution. Subject to this, the appellate jurisdiction of the Privy Council in respect of Indian appeals remained unaffected. The Federal Legisature also was empowered to widen the appellate jurisdiction of the Federal Court, restricting to that extent the jurisdiction of the Privy Council. (Vide section 206 Government of India Act, 1935).

jurisdiction of His Majesty in Council to entertain appeals or petitions from any judgment, decree or order of any court or tribunal in India in any matter civil or criminal.

The new constitution of India ushered into existence the Supreme Court having original,[124] appellate[125] and advisory jurisdictions. This was now destined to be the highest tribunal of the land. The relation between the Privy Council and the newly created Supreme Court of India was thus emphasised by Shri K. M. Munshi : "On the 26th of January, 1950 our Supreme Court will come into existence and it will join the family of Supreme Courts of the democratic world of which the Privy Council is the oldest and perhaps the greatest. I can only hope and trust that though we part with the Privy Council, our Supreme Court will carry forward the traditions of the Privy Council, traditions which involve that judicial detachment, that unflincing integrity, that subordination of everything to the rule of law and that conscientious regard for the right and for justice not only between subjects and subjects but also between the state and the subjects. And no higher tribute can be paid to the Privy Council than my hope that our Supreme Court may be given the strength to maintain the traditions of fearless justice which have prevailed in this country as a result of the supremacy of the Privy Council."

124. The Supreme Court has exclusive jurisdiction in matters between the centre and the constituent units.

125. Appeals can be entertained from the decisions of the High Courts when the High Courts certify that the case involves a substantial question as to the interpretation of the constitution. Being satisfied as to this condition, the Supreme Court also can grant special leave of appeal when the High Courts refuse to do so; again the Supreme Court can entertain appeals from the decisions of High Courts when the subject matter involved is valued more than Rs. 20 000/ and the High Courts certify that a substantial question of law also is involved. In other cases the High Courts have to certify that it is a fit case for appeal to Supreme Court.

CHAPTER XIV

Development of Hindu Legal History during the British Administration

1. Introduction

As it has already been seen, the Dharmasūtras, the Dharmaśāstras and the Arthaśāstra of Kauṭilya along with the different commentaries and Nibhandhas reveal a state of the Hindu society in which Hindu law was highly developed both in its civil as well as criminal sides including their substantive and adjective aspects. So far as the civil side was concerned, almost all conceivable topics beginning from debt and deposit and ending with boundary disputes[1] and partnership—"Sambhūya-samuthānam"[2] had been elaborately discussed on the basis of many sound juristic principles; the adjective law beginning from the institution of a suit and terminating with judgment or "jayapatra" was fully discussed; the law of evidence also was based on sound doctrines which very much helped the courts in arriving at truth by both oral and documentary testimony; in criminal law again, all the usual forms of crimes were recognised and many forms and theories of punishment[3] were devised so much so that the Hindu jurists could claim a very wholesome system of law for the governance of the society, as it was at that time. The conception of crimes and punishments culminated in the theory that even the king could not go uncensured in cases where he failed to administer the criminal law in the appropriate way.[4]

But this highly elaborate and perfectly developed Hindu system of law was almost entirely eclipsed[5] by the Muslim legal system, when the Muslim rulers succeeded in establishing and consolidating an empire in

1. For deciding boundary disputes in particular, instructions were given by the sages to consult the elderly members of the village "grāma-briddhan". Again some articles were to be so placed in the boundary lines as they might easily help in the determination of any dispute. See ante, chapter IV.

2. The definition of "sambhūyasamutthānam" has been exactly on the modern line of partnership, as the combination of skill and fund was mainly for profit or gain.

3. The punishments varied from fine to capital sentence. The different forms of capital punishment again were prescribed for different ways of killing.

4. For criminal jurisdiction, see Yājñavalkya, I. 337, 368; Manu, VII, 14, 16, 18, 22-'8; Gautama, XII, 48 and Āpastamba, XII, 52.

5. Even at the present time, it is clearly seen that all legal terms other than English are of Perso-Arabic origin. No Sanskrit term has ever survived,

India. So far as the royal courts were concerned, the Muslim law became naturally very prominent and the Hindu law was reserved for its administration by the Hindu panchayats only among themselves. In criminal law in particular, the Muslim law happened to replace it altogether. Thus though the Hindu law did not die out during the Muslim period, people were being generally governed by the Muslim system of law, administered through the Muslim Kazis and Muftis. But when the Britishers came to settle in and dominate over India, they found, for obvious reasons, that the Muslim system of law was not quite adequate for the purpose. Hence though Warren Hastings began with the reservation of Hindu law for the Hindus and Muslim law for Muslims in certain topics at least, still in no time, it was discovered that the then prevailing system was under the imperative necessity of modification. The result was that measures were being adopted from time to time to pass certain general laws to bind both the Hindus and the Muslims only leaving some topics of personal laws to be regulated by their own respective systems, that again subject to some modifications. In these circumstances, Hindu Legal History was peculiarly affected. The obscurity to which Hindu law was led during the Muslim rule was greatly unveiled and thence forward both the systems of Hindu and Muslim laws were equally being modified to suit the changed environments, as the result of India's contact with the Britishers.

The then prevailing Muslim system of law in general with its peculiar and archaic[6] conception of criminal law in particular and the most artificial and useless law of evidence[7] gave rise to a very unhappy

6. The first systematic attempt to modify the Muslim criminal law was made by Lord Cornwallis in 1790. Intent was made the criterion of the offence of murder instead of the nature of the instrument ; the next of kin was no longer allowed to exercise the right of pardon ; in place of amputation, imprisonment with hard labour was suggested and amputation was finally abolished in 1791 ; the criminals sentenced to lose two limbs were to be kept in prison with hard labour for fourteen years ; and those criminals who were to lose one limb only were to be imprisoned with hard labour for seven years. In 1792, it was provided that refusal on the part of the relations to prosecute for murder would be no bar. The occasional modifications continued until the passing of the Indian Penal Code in 1860.

7. The rule of Muslim law to determine the competence of witnesses on the ground of religion was abolished by Lord Cornwalis in 1792. "That the religious tenets of witness be no longer considered as a bar to the conviction or condemnation of a prisoner ; but in cases in which the evidence is given on a trial would be deemed incompetent by the Mahomedan law on the plea of the person's giving such evidence not being of Mahomedan religion, the law officers of the court of circuit were to declare what would have been their Fatwa supposing such witnesses had been of Mahomedan persuation"......(Resolution of the Governor General in Council, dated April 27, 1792).

and chaotic state of things which required immediate improvement. Things became more favourable after the passing of the Charter Act of 1833 which made provisions for the creation of an all India Legislature and appointment of a Law Member as well as a Law Commission. The influence of Bentham also was greatly felt in making all out efforts for codifying the various branches of the then Indian law. The moment was opportune and the idea was welcome even by the Indians themselves. Thus it follows that during the Hindu period, Hindu law alone was sufficient for the exhaustive governance of the then society ; but during the Muslim period, the Muslim system of criminal law came to be prominent, so much so, that the Hindu conception of crimes with punishment and prāyaścitta came to be over-ridden. For the civil disputes that were specially connected with religion and the caste, the parties would settle among themselves or through the mediation of their own panchayats. Regarding other non-religious civil disputes parties might be rarely approaching the Muslim Kazis specially when one of the parties was a Muslim. Even upto the recent times, it could be seen that the Hindus would consult Pandits and theologians regarding the laws of inheritance, adoption and marriage rather than any lawyer. But when as the result of legislation and adjudication, the points became very knotty, it was then alone that the people began to consult lawyers. So if the Muslim rule was responsible for the suppression of the civil side of Hindu law, the British rule was largely responsible again for the suppression of the whole system of the then Hindu-Mahomedan law.[8] This was effected through codification which again was largely aided by the Law Commissions. The importance of codification was thus stressed by Lord Macaulay : "I believe that no country ever stood so much in need of a code of laws as India, and I believe also that there never was a country in which the want might so easily be supplied......... The work of digesting a vast and artificial system of unwritten jurisprudence is far more easily performed and far better performed by a few minds than by many, by a Government like that of Prussia or Denmark than by a Government like that of

The nature of evidence was substantially changed in cases of adultery. The whole law was rationalised, when it was provided that convictions could be based on confession, testimony and circumstantial evidence.

8. Vide section L III of Regulation IX of 1793.

The Regulation VI of 1832 marks the end of the application of Muslim law of crimes to all persons : it also provided for the trial by jury. The Non-Muslims could claim to be tried not by the Muslim system. This Regulation created a hiatus which was filled in by the Indian Penal Code having a general application to all.

England. A quiet knot of two or three veteran jurists is an infinitely better machinery for such a purpose than a large popular assembly divided, as such assemblies almost always are, into adverse factions. This seems to me, therefore, to be precisely that point of time at which the advantage of a complete written code of laws may most easily be conferred on India. It is a work which cannot without great difficulty be performed in an age of freedom. It is the work which specially belongs to a Government like that of India—to an enlightened and paternal despotism." Macaulay was obviously very anxious to see that the law in India was made uniform aud systematic without unnecessarily wounding the feelings of the people. This aspect of the question of codification was underlined by him in his celebrated speech in the House of Commons: "We must know that respect must be paid to feelings generated by differences of religion, of nation and caste and much, I am pursuaded, may be done to assimilate the different systems of law without wounding those feelings. But whether we assimilate those systems or not, let us ascertain them, let us digest them. We propose no rash innovation, we wish to give no shock to the prejudices of any part of our subjects......... Our principle is simply this—uniformity where you can have it—diversity where you must have—but in all cases certainty." The second Law Commission also expressly recommended for not codifying the personal laws of the Hindus and the Muslims, though it was unanimous on the point that "what India wants is a body of substantive civil law, in preparing which the law of England[9] should be used as a basis, but which once enacted, should itself be the law of India on the subject it embraced." Regarding the inexpediency of codifying the Hindu and the Muslim personal law, the Commission came to the conclusion that "no portion either of the Mahomedan law or of the Hindu law ought to be enacted as such in any form by a British legislature. Such legislation, we think, might tend to obstruct rather than to promote the gradual progress of improvement. The reasons against the codification of the personal laws of the Hindus and the Muslims were thus given by the Commission: "The Hindu law and the Mahomedan law derive their

9. The exact recommendation of the Commission on this point was: "Being designed to be the law of India on the subject it embraces, this body of law should govern all classes of of persons in India, except in cases excluded from its operation of its rules by express provisions of law.........There is no reason why on very many important subjects of civil law, we shall name one, contracts as example, such law cannot be prepared and enacted as will be no less applicable to the transaction of Hindus and Mahomedans by far the most numerous portions of the population than to the rest of the inhabitants of India."

authority respectively from Hindu or Mahomedan religion. It follows that as a British legislature cannot make Mahomedan or Hindu religion, so neither can it make Mahomedan or Hindu law. A code of Mahomedan law or a digest of any part of that law, if it were enacted as such by the Legislative Council of India, would not be entitled to be regarded by the Mahomedan as the very law itself, but merely as an exposition of law which possibly might be incorrect. We think it clear that it is not advisable to make any enactment which would stand on such a footing."

Hence the Commission advocated a uniform legislation for the whole country embracing all the different classes of people subject to such exception as might be necessary and expedient : "If on subjects embraced in the new body of law, it should be deemed necessary that for a particular class of persons or for a particular district or place, there should be law different from the general law, and if there shall be no particular and cogent objection to the insertion of such special rule into the proposed body of law, such special law, we think, ought to be provided in that way."

The first Law Commission was appointed in 1834 with Lord Macaulay as the chairman. As the criminal law was in the most chaotic condition, the Commission was specially instructed to draft an Indian Penal Code. Though the draft was submitted in 1837, it did not become an Act until 1860. The first Law Commission made a very comprehensive proposal that an Act should be passed making the substantive law of England as the law of the land (*lex loci*) subject to certain conditions and restrictions. Though nothing very concrete came out of the proposal of the first Law Commission and though it was subject to vehement criticism, still it supplied the right-thinking people with sufficient material regarding the codification of Indian law. The only case where the recommendation of the *Lex Loci* report was given effect to was passing of the Caste Disabilities Removal Act of 1850 or the Freedom of Religion Act. This piece of legislation had immense effect on the Hindus and the Muslims who were not to lose any proprietory interest merely by their conversion to christianity.[10]

The Charter Act of 1853 made some improvement in the status[11] of

10. For Bengal, section 9 of Regulation VII of 1832 already provided that the renunciation of the Hindu or Muslim religion should not entail the loss of proprietory rights.

11. The Law Member could not sit or vote in the Governor General's Council according to the Charter Act of 1833 except in meetings held for making laws and regulations. But by the Charter Act of 1853, the Law Member was made a full-fledged member of the Council.

the Law Member and the second Law Commission was appointed in England in 1853. This Commission submitted more than one report and the second report was the most significant of all. This report gave the principles[12] on which the process of codification was to be effected. The second Law Commission also examined the recommendations of the first Law Commission in the different aspects. The second Law Commission concluded by saying that "we have the satisfaction of being able to state that our opinions as to the defects in the state of the substantive civil law in India and the expediency of framing and enacting a body of laws for India based upon English law, are very much in accordance with the views of the Law Commissioners in India."

Another most imortant recommendation of the second Law Commission was the amalgamation of the Supreme Courts and the Sadar Courts and the passing of uniform codes of civil procedure and criminal procedure for all the courts of India. In the result the Indian Penal Code was passed in 1860; the Civil Procedure Code was passed in 1859 and the Code of the Criminal Procedure was passed in 1861. The Limitation Act also was passed in, 1859 shortly after the passing of the Civil Procedure Code.

After the policy of codification was enunciated by the second report of the second Law Commission, the third Law Commission was appointed on December 14, 1861 for the purpose of preparing a body of substantive civil law of India. The third Law Commission at once "set on foot the work of drafting and may be taken as the end of the discussion on policy and closing—if not a chapter—at least a paragraph, of British Indian History which may be entitled "the Codes are comming."[13] It submitted many important drafts including those for the law of Succession, Contract, Evidence and Negotiable Instrument.

The most important of the above drafts, from the stand-point of legal history was that which aimed at codifying the law of succession of all the persons in India except the Hindus and the Muslims. This draft gave rise to the Indian Succession Act of 1865[14] which was further

12. The new Commissioners were directed to frame codes for substantive law on the basis of the English law and once such a law was to be the law for the whole of India subject to such exceptions and modifications as might be deemed expedient.

13. Rankin, Background of Indian Law, p. 45.

14. The Succession Act was well-received from all quarters. Sir Henry Maine also very highly appreciated this useful piece of legislation : "Even in England this body of rules has never been put into so intelligible and accessible a shape, as it is placed by this law......... The rules which it includes are for the most part, so extremely simple as to be readily intelligible to a lay man and my belief is that any man of intelligence can form a

amended and made more comprehensive by the Indian Succession Act of 1925. Further modifications and amendments were made in 1928, with the result that many of the provisions of the Succession Act of 1925 are now applicable to the wills made by the Hindus, Jains, Sikhs and Buddhists. Thus this Act had a direct and important bearing on Hindu Legal History. The Hindus and Muslims no doubt had their personal laws for governing succession and inheritance. But the legal position of many other persons, such as, the Christians, the Jews, the Armenians, the Anglo-Indians, the Parsees and the Europeans was far from clear and precise. Similarly very useful purposes were served by the Evidence Act of[15] 1872 and the Indian Contract[16] Act of the same year. Reference has already been made to the Indian Penal Code,[17] the Civil Procedure Code[18] and the

competent judgment on their character and probable effects.........It does not appear to me that for the sake of attaining simplicity, the Commissioners, so far as they have gone, have sacrificed any really valuable principle of English jurisprudence. On the contrary, I regard the system which they propose not only as much more intelligible to the generality than that which at present obtains in the Presidency towns, but as much more conducive to the certainty and security of all legal transactions."

15. The law of evidence was very vague, uncertain and irrational; it was essentially based on the principles of Muhamedan jurisprudence which were followed by courts during Muslim rule in India. There was hardly any reliable law of evidence. Hence a very urgent necessity was felt for the codification of the law of evidence. The Indian Evidence Act was passed in 1872. There was hardly any amendment of the Evidence Act so far. There is sufficient room for its revision and modification.

16. Originally the Hindus and the Muslims were governed by their personal laws and usages regarding contracts. But a uniform law for both these communities along with others was recommended by the second Law Commission in its second report. The result was the Indian Contract Act of 1872. This Act has been criticised from many standpoints and there is some justification for the remark that it is a perfect specimen of bad codification. As a matter of fact, many amendments were made to the draft Contract Act by the Select Committee of the Legislative Council. Naturally the Commissioners did not like it and ultimately they had resigned.

17. It need hardly be the said that the Indian Penal Code was the most welcome piece of legislation in view of the miserable plight of the criminal law of the time that was prevalent, according to the essential principles of Muslim jurisprudence, amended and modified from time to time by the Britishers. Lord Macaulay was thus justified in applying his first attention to the draft of the Indian Penal Code through the first Law Commission. This Act was highly spoken of. According to Whitley Stokes, the Penal Code was based on English law, but at the same time it was "stript of the technicality and local peculiarities, shortened, simplified, made intelligible and precise."

18, 19. The two codes of Civil and Criminal Procedure, after several amendments, served the most useful purpose of defining and enforcing certain regular procedures in both civil and criminal cases. The complexities and difficulties in the existing system of law could be very well understood from the following words in a letter written to the Governor General

Criminal Procedure Code.[19] The fourth Law Commission[20] was appointed on February 11, 1879, which included among others, Dr. Whitley Stokes who was already entrusted with the task of drafting bills on Trusts, Easements, Alluvion and Diluvion, Master and Servant, Negotiable Instruments and Transfer of Immovable Property. This Commission also re-iterated with its predecessors that the basis of the Indian codification should be English law, subject to necessary and desirable exceptions and modifications. The process of codification was also still to be continued. The most striking emphasis of this Commission was laid on the consideration of Indian circumstances and customs in matters of codification.

As it has been seen above, legislation during the British administration played a very important part through codification in the development of the Indian Legal History in general and the Hindu Legal History in particular and though professedly the Britishers were not in favour of modifying the personal laws of the Hindus, still as a matter of fact, such modification did take place on many topics of Hindu law, inspite of the "natural sensitiveness of the Hindus about legislative interference with matters closely touching their religious usages and observances."[21] The observations of Morley[22] are very significant in this connection. The

in Council by the judges of the Supreme Court of Calcutta. "...There are English Acts of Parliament, specially provided for India, and others of which it is doubtful whether they apply to India wholly or in part or not at all. There is the English common law and constitution, of which the application, in many respects, is still more obscure and perplexed; Mahomedan law and usage, Hindu law, usage and scripture, Charters and Letters Patent of the Crown; Regulation of the Government, some made declaredly under Acts of Parliament particularly authorising them and others which are founded, as some say, on the general power of Government, entrusted to the Company by the Parliament and as others assert on their rights as successors of the old native Governments. Some Regulations require registry in the Supreme Court, others do not; some have effects generally throughout India, others are peculiar to only Presidency towns. There are Commissions of the Government and the circular orders from the Nizamat Adalat and from the Diwani Adalat: treaties of the Crown; treaties of the Indian Govetnment......."

20. Lord Salisbury, the then Secretary of State for India, wanted to draw the attention of the Government of India by saying that "the long and continuous course of action which has been pursued by the Indian Government in all its branches forbids me to regard the question of Civil Code to India in any sense an open one." He further declared that "the completion of a Code of law is an accepted policy which cannot now be abandoned without great detriment to the people and serious discredit to the Indian Government."

21. These are the words of Sir C P. Ilbert.

22. "In considering the propriety of altering or abrogating the Hindu or Mahomedan laws, all pre-concieved notions of the relative excellence of the English and native system of jurisprudence should be taken as secondary consideration, nor should it be called in question whether such systems are in themselves good or bad ; for it should never be forgotten that in

legislations affecting the personal laws of the Hindus were always supported by at least some sections of the people. Thus backed greatly by the public opinion, many changes in the Hindu personal law were effected. Reference may be made in this connection to the special enactments that have been passed for improving the position of Hindu women. By the Hindu Widows Re-marriage Act of 1856, Hindu widows also could legally remarry.[23] The Hindu Women's Rights to Property Act, passed in 1937 and amended subsequently (repealed by the Hindu Succession Act, 1956) also gave some increased rights to women and this legislation had very fundamentally affected the conceptions of joint family, coparcenary, partition and inheritance in Hindu law. Another Act that had given some new rights to women in Hindu law was the Hindu Married Women's Rights to Separate Residence and Maintenance Act. It was passed in 1946. This Act provided for separate residence and right to maintenance for a wife from her husband under certain conditions, even without having judicial separation. This Act has been repealed by the Hindu Adoption and Maintenance Act 1956. The Child Marriage Restraint Act of 1929 also, as amended by Acts VIII and XIX of 1938, has done away with the evils of early marriages and multiplication of girl widows.[24] Again the Hindu Marriage Validity Act of 1949 had introduced a very great innovation on the so-called caste-system supposed to have been prevalent in the Hindu society from time immemorial. According to the provision of this Act, inter-caste marriages[25] were valid—and "no marriage between Hindus shall be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to different religions, castes, sub-castes or sects". This Act has been repealed by the Hindu Marriage Act (XXV) of 1955. Another very striking legislation on Hindu law of marriage was the Hindu Marriage Disabilities Removal Act (XXVIII) of 1946 which came into effect on November 22, 1946. This Act "declares that no marriage between Hindus, which is otherwise valid, shall be

the present state of society in India, they are undoubtedly the best adapted to the wants and prejudices of the people who form the great bulk of the population of the country; that they are an integral part of faith of that people; and that though we may not be bound by absolute treaty, we have virtually pledged our-selves to preserve them by repeated proclamations and enactments."

23. There was a great difference of opinion amongst the different text-writers and commentators if the re-marriage of a widow was valid. (For details on this point, vide supra).

24. See supra.

25. Before the passing of this Act, there was a confusion on this point and according to some High Courts such inter-caste marriages were void.

invalid by reason only of the fact that the parties thereto—(a) belong to the same Gotra or Pravara, or (b) belong to different subdivisions of the same caste. The first part definitely legalised sagotra marriage, though the general judicial opinion had been so long against it. The second part practically gives effect to the existing law which recognises, as valid marriages between different sub-divisions of the same caste."[26] This Act also has been repealed by Hindu Marriage Act, 1955.

As regards the Hindu law of inheritance, as modified substantially by legislation, reference may be made to the Hindu Inheritance (Removal of Disabilities) Act (XII)[27] of 1928 and the Hindu Law of Inheritance (Amendment) Act (II) of 1929. Section 2 of the former Act provides that "not-withstanding any rule of Hindu law or custom to the contrary, no person governed by the Hindu law other than a person who is and has been from birth a lunatic or idiot shall be excluded from inheritance of from any right or share in joint family property by reason only of any disease, deformity or physical or mental defect".

This legislation was necessary to modify the Hindu law on the point which was otherwise based on the texts of Manu, Yājñavalkya and Baudhāyana according to whom the theory of inheritance implies that wealth descends on the heir to enable him to rescue the deceased from eternal misery; consequently, one who is unable or unwilling to perform the necessary rites is incompetent to inherit.

Thus Manu says,

> "Anaṃśaklīvapatitajātyandha-vadhirāstathā
> Unmattajaḍamūkāśca yeca kecinnirindriyāḥ"

Similarly Yājñavalkya says :

> "Patitastatsutaḥ klīvaḥ pangurunmattakojaḍaḥ
> Andhācikitsyarogārtā bhartavyāste niraṃśakāḥ"

In the language of Baudhāyana, "Atītavyavahārān grāsācchādanaiḥ bibhriyuḥ ; Andhajaḍaklīvavyasanivyādhitādīṃścākarmiṇaḥ patitataj jātakaśca"

Section 2 of the Act II of 1929[28] provided that "a son's daughter,

26. Dr. B. K. Mukherjee, the late Chief Justice, Supreme Court, India, preface to the 11th Edition of D. F. Mulla's Principles of Hindu Law, P. VI.

27. This Act was not retrospective.

28. This Act was not retrospective and applied only to the Mitākṣarā school including its subdivisions, such as, the Mayūkha but not the Dāyabhāga school. It came into force on February 21, 1949 and thus it was applicable only to cases where the question of succession opened after that date. The Act applied to the Jains in Gujrat who are governed by the Mayūkha. (43 Bom. L.R. 114).

daughter's sister and sister's son shall in the order so specified be entitled to rank in the order of succession next after a father's father and before a father's brother provided that a sister's son shall not include a son adopted after the sister's death." This Act has been repealed by the Hindu Succession Act (XXX) of 1956.

The last and most important epoch in the Hindu Legal History is the administration of Hindu law by the British rulers. Though this is the last epoch, still the last word has not been spoken in many topics of Hindu law. A revolutionary proposal had been made to modify the Hindu law by the introduction of the Hindu Code Bill[29] and its fragments in the Central Legislature of India.

The Hindu Code Bill and its subsequent fate will be discussed more fully in the next chapter.

The policy of the ritish rulers was very significant in matters of modification of the personal laws of the Hindus and the Mahomedans. They began with the policy of non-interference[30] and generally allowed the then existent systems of law to prevail ; but gradually they began to assert themselves being, of course, backed by a strong section of the public opinion. In some of the cases the administration of the Hindu law by the British rulers resulted in unmixed good for the society, though even

29. Vide the last chapter of the thesis.

30. Warren Hastings began with the general proposition that the Hindus be governed by the laws of their Shāstras and the Muslims be governed by the laws of their Koran. The policy thus enunciated towards the very early years of British contact was scrupulously adhered to throughout the subsequent years. And furthermore, for an effective and sincere realisation of this scheme, Hindu and Muslim Law Officers were appointed to help the English judges by correctly interpreting their own laws. The posts of these native Law Officers were abolished only when it was perceived that the foreign judges were on firmer ground to administer the law independently of these Law Officers. Act XI of 1868 was passed to put an end to this system of native Law Officers.

Sir William Jones did dot perhaps exaggerate when he said that "it would be absurd and unjust to pass an indiscriminate censure on so considerable a body of men, but my experience justifies me in declaring that I could not with an easy conscience concur in a decision merely on the written opinion of native lawyers in any cause in which they could have the remotest interest in misleading the court nor howsoever vigilant we might be, would it be very difficult for them to mislead us, for a single obscure text, explained by themselves might be quoted as express authority though perhaps in the very book from which it was selected, it might be differently explained, or introduced only for the purpose of being exploded. Even if there was no suspicion of corruption on the part of the interpreters of the law, the science which they profess is in such a state of confusion that no reliance can be placed on their answers."

in these cases as well *there was a vehement* opposition *from* the *orthodox section of the Indian public. The "Sati rites," and the sacrifice of children into the Ganges are not misunderstood by the present generation of the* people. But with the Hindu Code Bill, the question was not the question of quality alone ; it was also the question of quantity as well. It is no gainsaying the fact that the question of quantity had struck the people more than the question of quality. Some qualitative changes had already been made in Hindu law : but this time the quality *plus* the quantity had evoked the greatest criticism. The British rulers, by means of administrative measures, legislative acts and judicial decisions exerted an immense influence in the development of Hindu law—unprecedented in its history.

2. The British period which influenced the development of Hindu law to the greatest extent

Though as a matter of fact, the British rule was introduced into India by the assumption of Diwani by the East India Company in 1765, the actual influence of the British administration, particularly in the development of the Hindu law, could not take place so prominently before the middle of the 19th century. Constitution of the legislature and the establishment of High Courts with their subordination to the Privy Council served as impetus for the development of the Hindu law. The legislature began to introduce new laws modifying old ones and the courts of justice also began to pronounce judgments which were not always in keeping with the genius of the orthodox Hindu system of law. Thus though major changes were wrought in Hindu law at a rather late stage during the British administration in India, still many important changes and modifications were effected even shortly after the assumption of Diwani by the East India Company. The first rule, according to Field,[31] of substantive law, for the courts in the Mofussil was to be found in section 23 of the Judicial Regulation of the 21st August, 1772. The section provides that "in all suits regarding inheritance, marriage, caste and other religious usages or institutions, the laws of the Koran with respect to the Mahomedans and those of the Shastar with respect to the Gentoos shall be invariably adhered to." No provision was, however, made for cases not included in this rule. The same rule was repeated in the Judicial Regulations of the 11th April, 1780, but the omission was corrected by the special direction to the Superintendent of the Diwani Adalat who should "in all points which have not been expressly provided for by these

31. Introduction to the Regulations of the Bengal Code, p. 211.

Regulations act discretionally and according to the best of his judgment."[32] In the Regulations of the 5th July, 1781, drawn by Sir Elija Impey, the rules for the Hindus and the Mahomedans were still retained, but there was an additional provision that in all cases for which no specific directions were given, the judges should act according to "justice, equity and good conscience."[33] This two-fold rule of substantive civil law was reproduced in the Regulations[34] of 1793. When Regulation IV of 1793 was extended to the province of Benaras by Regulation VIII of 1795, the following addition was made to the rules regarding the administration of Hindu and Mahomedan system of law : "In causes in which the plaintiff shall be of a different religious persuation from the defendant, the decision is to be regulated by the law of the religion of the latter excepting where Europeans or other persons not being either Mahomedans or Hindus shall be defendants in which cases the law of the plaintiff is to be made the rule of decision in all plaints and actions of a civil nauture."[35] In 1831, the Munsiffs were for the first time invested with general powers to try cases respecting real property by the Regulation V of that year. It was provided by that Regulation that in all cases of succession to or inheritance of landed property, Mahomedan law would apply to the Mahomedans and Hindu law to the Hindus. But when the religious persuation of the parties was different, the case was to be tried according to the law of the defendant. In absence of any definite provision of law, the cases were to be tried according to justice, equity and good conscience. From a reference to the above and other relevant Regulations[36] it will be abundantly clear

32. Section 42.

33. Section 60 for the Mofussil Courts of Diwani Adalat and section 93 for the Sadar Diwani Adalat.

34. Section 11 of Regulation V of 1793 and section 7 of Regulation VI of 1793 supply the deficiency by enacting that these courts respectively shall in trying original cases and appeals "proceed in the same manner and with the like powers and authority and subject to the same restrictions, limitations and exceptions, as are prescribed to the Zilla and city courts."

35. Section 3, Regulation VIII, 1795.

36. According to Sir William Markby, (Hindu and Mahomedan law, pp. 7, 8) there would not be any question of any law being made by any authority whatsoever excepting the emperor of Delhi who was still ruling there. The Diwani gr nted to the East India Company meant only the cession of some administrative privileges. The British Government could not directly promulgate law to interfere wiih the law of the country. They could only suggest and advise certain "regulations" for the efficient administration of the people, subject to the sovereign authority of the emperor of Delhi. It was for this reason that according to Kaye, the British Government objected to the use of the word "laws" by Lord Cornwallis ; laws proper could be promulgated by the emperor of Delhi alone to whom the East India Company was legally responsible. (Kaye, Administration of East India Company, p. 83,

that though some changes were introduced and modification effected regarding the constitution and the jurisdiction of the different courts, as they existed from the time of the Mahomedan rule, still there was hardly any appreciable interference with the personal systems of Hindu and Mahomedan law. At the outset, the Britishers accepted for administration the machinery, as devised and maintained by the Muslims,[37] and they did not interfere with the actual application of the personal systems of law to their subjects. Thus writing to John Buller on the 12th of October, 1781, Warren Hastings[38] said, "............As the natives are not to be tried according to our notions of justice, but by the established law of the country, excepting in very extra-ordinary cases where it had been usual for the Government to interpose, I must request that you will permit the officers appointed for that purpose to carry the enclosed warrant into immediate execution." As it has already been noticed in the preceding chapters, Hindu law was mainly administered by Hindu panchayats and caste-tribunals for most of the disputes which would not be usually dragged before the courts during the Muslim rule. But if any such case was at all brought before the king's courts, the Muslim kings or their officers would adjudge the disputes with reference to justice, equity and good conscience, when purely Muslim laws were applied to the Muslims. Contrasting these two systems, Field rightly observes that "under the Mahomedan Government, justice was distributed by two distinct classes of tribunals, viz., (1) those of the Kazis who administered the elaborated system of Mahomedan law and (2) those of the officers of the Government whose authority was regulated by no fixed rules, but was generally exercised with a view to their own interest, more specially, when the litigants were alien in race and creed. The king occasionally enquired into petitions but calls of war and other care of state left little leisure for taking any regular and systematic share in the administration of justice...To compare one thing with another, the pure Mahomedan law, administrated by the Kazis was *jus civile*. The king's officers, like the Roman praetors, had to supplement this law for Hindus and others for whom it did not provide. The absence of system and the rapacity of the times prevented their *jus honorarium* from assuming either in form or substance any thing like the shape of a new body of *acquitas*."[39]

37. The Muslim law of administration was largely retained by Warren Hastings who at the same time recognised Hindu law also for the Hindus.

38. Warren Hastings was writing in reply to an enquiry made by John Buller regarding the execution of certain punishment awarded to certain dakaits.

39. Introduction to the Regulations of the Bengal Code. p. 169.

According to Fitjames Stephen,[40] "the exercise of criminal jurisdiction is both in theory and in fact the most distinctive and most easily and generally recognised mark of sovereign power, in as much as, all the world over, the man who can punish is the ruler." Seven years after the assumption of the Diwani, the East India Company's Government took up the first step towards the improvement of the administration of justice.[41] In order to give easy and free access to justice and relief, a box[42] was to be kept at the door of the court house or Kutchary. The litigants might lodge their petitions therein, at any time of the day. The key of the box was to be kept by the collector himself who would open the box and have the grievances and the complaints read in his presence only on the court day. Trivial and groundless complaints were to be punished with a fine not exceeding five rupees or corporal punishment not exceeding twenty lashes—according to the gravity of the offence and the status of the man in the society. The dacoits had to be executed in their own village "for terror and example of others." The professional dacoits would be inflicted capital punishment and they were to be condemned to prepetual slavery. It was proposed by Warren Hastings in 1773 "that all convicted felons sentenced for life shall be sold as slaves." It was argued by him that thereby the Government would be "released from a heavy expense in erecting prisons, keeping and maintaining accumulating crowds of prisoners." Moreover, the sale of convicts would fetch considerable sum to augment the revenue. It was also provided[43] that in all suits regarding inheritance, marriages, caste and other religious usages or institutions, the laws of the Quran would invariably be adhered to in respect of the Mahomedans and the laws of the Shastra would be strictly followed with respect to the Hindus. On these occasions again, the Maulavis and the Pandits were to attend and expound the law. The custom of consulting Muftis and Pandits existed from an early period of Muslim rule ; this practice was adopted by the British rulers also. In 1805, the Hindu and Mahomedan Law Officers were made Sadar Amins by virtue of their offices. The institution of employing Pandits as official referees in helping the exposition of the Sanskritic law was abolished in the year 1868. The interference of the British rulers with

40. Minute on the administration of justice in British India (No. 89 of Selections from Records of the Govt. of India, Home Department, 1872).

41. Regulations of the 15th August, 1772.

42. This was done clearly in imitation of what was done by some Muslim rulers including Jahangir who also had a box tied with a chain of gold from the palace up to the street wherein people could easily lodge their complaint without delay or harasment.

43. The Regulations of the 21st August, 1772.

the substantive civil law was steadily in the increase and their attitude could be clearly understood from the general provisions.[44]

The substantive law of the criminal courts also continued mainly to be Indo-Muslim in character ; still there were many modifications. Reference may be made to some of them. Slavery was abolished.[45] The Brahmins could no longer claim exemption from capital punishment.[46] The punishment of tashhir or carrying a delinquent through the town on an ass, with his face blackened, was abolished by Act II of 1849. The use of the Kora or scourge was forbidden and the Rattan[47] substituted therefor, by section 4 of Regulation XII of 1825. Females were exempted from flogging by section 3 of the same Regulation. The relations of murdered man were debarred from pardoning the offender since 1790. "It was also enacted that the doctrine of Yusuf and Mahomed should be followed without the distinction of Abu Hanifa or in other words that the intention of the criminal either evidently or fairly inferrible from the nature and circumstances of the case and not the manner or instrument of perpetration, except as evidence of intent, should constitute the rule for determining the punishment."[48] According to Abu Hanifa, it was murder to kill a child cutting its throat with a knife or any other lethal weapon, but it was no murder to kill it by holding its head under water till it was suffocated. The professional miscreants at once saw the distinction and they could act accordingly to avoid the consequence of legal murders. The punishment by mutilation was abolished in 1791. Fourteen years' imprisonment with hard labour was substituted for the loss of two limbs and seven years' imprisonment for the loss of one. The sacrifice of children at sea was prohibited by Regulation VI of 1802. The posts of Law Officers who expounded the Mahomedan law were abolished by Act XI of 1864.

3. Different organs through which Hindu law was influenced during the British period

As it has been noticed above, after the assumption of the Diwani, the Government of East India Company adopted the policy of absolute

44. Section 24 of Act VI of 1871.

45. 3 and 4 Wm, IV, Cap. 85, Section 88 and Act V of 1843.

46. Section 15, Regulation XVII of 1817.

47. In 1787 there was some change in the system of administration of justice in pursuance of the instructions brought by Lord Cornwallis. The Magistrate was empowered to inflict corporal punishment not exceeding 15 rattans and imprisonment not exceeding 15 days in petty offences. This was the first direct exercise of criminal jurisdiction by European functionaries in the Mufassil.

48. Field, Introduction to the Regulations of the Bengal Code, p. 177.

non-interference at the outset; but being dissatisfied with the mode of administering justice, the Government began to interfere. In that case also the amount of influence or interference was minimum. But with the growing needs of the people and similarly with the growing confidence in the Government, more and more interference was necessary and actually resorted to by the British Government. A sort of uncertainty and confusion prevailed for sometime after the assumption of Diwani. This state of things practically began much earlier during the declining years of the Mughal empire. The Zemindars, farmers and other revenue officers assumed a power for which no provision was made by the laws of the land.[49] The result of this state of things was best described thus:[50]

"The subject of the Mughal empire derived little protection or security from any of these courts; and in general though forums of judicature were established and preserved, the despotic principle of the Government rendered them the instruments of power rather than of justice not only unavailing to protect the people but often the means of the most grievous oppression under the cloak of judicial character."

It is also clear from[51] the same source that the administration of justice during the rigour of the ancient constitution was liable to great abuse and oppression, that the judges generally lay under the influence of interest and often under that of corruption; and that the interposition of Government from motives of favour and disfavour was another frequent cause of the perversion of justice. In a letter from the President and Council of Fort William of 3rd November, 1773, it was rightly stated that the regular course of justice was everywhere suspended;[52] but every man exercised it who had the power of compelling others to submit to his decision.[53] The Zemindars were prohibited by section 66 of the Regulation VII of 1793 under penalty of fine from taking cognisance

49. Mr. Shore admits that he cannot trace any delegation or investment of power for the trial of delinquents and the infliction of punishment upon them. If it was ever exercised, it must have been considered either as an encroachment on the royal prerogative or to have existed by sufferance. Mr. Grant considers that a Zemindar's sanad conferred an inferior judicial authority similar to that of an English Justice of the Peace.

50. The Seventh Report of the Committee of Secrecy.

51. *Ibid.*

52. Governor Verelst in his instructions to his supervisors in 1770 described every decision of the Mahomedan authorities as corrupt bargain with the highest bidder.

53. Speaking more specially of the Upper Provinces, the Earl of Moira wrote thus in 1815: "The former system left entirely at the discretion of the Amils, the lives and properties of all the population for their several jurisdiction. There was only an appeal to the immediate sovereign of the state and he was generally inaccessible."

of or interfering in matters of causes coming within the jurisdiction of the courts. The initial uncertainties and confusion were gradually eliminated from the administration and ultimately the British rulers introduced more and more systematic and elaborate rules of procedure for the administration of justice. After the consolidation of the British rule in India, the British administrative rules were also introduced with the result that the native machinery with its pitfalls had to come to an end. But the introduction of the new system and the necessary replacement of the old one were almost imperceptible, as they followed the path of the least resistance. People at large could hardly feel the transition and were struck by the methods and system brought in the train of the British rule. There was rapid progress on all sides. The elaborate English legal procedure was introduced ; Law Reports began to be published ; respect for precedents grew and on the whole, for the time being, the people ceased to think about the demerits of the system that was introduced by the British rulers. Legal profession was greatly responsible for the all round advancement of the country in the wake of Western education and civilisations. That was not, however, an unmixed blessing for the civilisation of our own country. Edmund Burke in his famous speeches on America rightly characterised law as the first and the noblest of human sciences. The study of law again according to him was regarded as one of the most important conditions responsible for the American independence. It played the same part in India also. With a galaxy of Indian lawyers and jurists, the advancement of the country in general and the development of the Hindu law in particular was greatly accelerated. The Hindu law which was so long reserved for the study of the "Brahmin-Pandits" was now open to be studied critically by Eastern as well as Western scholars. This critical study of Sanskrit literature in general and Hindu law in particular meant a great impetus for the development of Hindu law. The official referees, of course, helped the English judges upto 1868 but with the appointment of Indian judges and European judges who had in the meantime the advantage of studying Hindu law treatises for themselves and through translation, the study and scrutiny of Hindu law became independent of the Pandits. The legal profession also flourished a good deal. The lawyers generally became the leaders of thoughts and the society. Their position and influence in the society began to grow more and more. The assurance of the British rulers that the personal system of Indian laws would not be interfered with, was also greatly responsible for the revival of Sanskrit learning including the study of Hindu law with reference to the original texts.

With the growth of the legal profession, there was not only a concomitant impetus to the study of Hindu law, but at the same time there were many Law Journals and Reports which began to publish the decisions and the arguments of the authoritative tribunals which served a very wholesome purpose in the shape of precedents. Legal precedents were regarded as highly important and due respect began to be shown to them. In a sense, this respect for precedents was able to introduce a sort of system and method in the judicial administration of the country. The introduction of the foreign legal procedure replaced and replenished the local procedure which hopelessly deteriorated and resulted in chaos and confusion.[54] The foreign procedure, generally speaking, was as elaborate as it was costly[55] for the people of the country.

4. The nature of the legal procedure, as introduced by the British administrative machinery

In ancient and mediaeval.[56] Indian society, the machinery for the administration of law was quite simple. The cases both civil and criminal were often tried personally by the kings or the judges on receipt of juristic instructions from the experts or the Pandits. There was hardly any engagement of lawyers to plead on behalf of the parties. The law of evidence also was quite simple. There could not be any lengthy cross-examination by any lawyer except the most searching and relevant questions put by the king or the judge himself, to arrive at the correct decision. The modern system of judicial administration has been received from the British rulers consequent on their the then domination over India. There are undoubtedly some very beneficial principles of the highest importance; nevertheless, the introduction of the very procedure and those principles into India has given rise to unnecessary details and complications resulting in unusual delay and in many cases even ultimate failure of justice at enormous costs and troubles on the parts of the litigants concerned. The different complicated stages in litigation and repeated adjournments have been clearly responsible for occasioning rooms for corruption and bribery. Sometimes efforts are directed at correction, but without any encouraging result. Now it is almost an accepted condition

54. See the interrogatories from Government to the Provincial Court of Appeal and Circuit at Murshidabad, received in a letter from the Secretary to the Judicial Deptt., dated 29th October, 1801 with answers thereto, as submitted by the said court. (Appendix to the Fifth Report from the Select Committee on the Affairs of the East India Company, p. 384).

55. *Ibid*, p. 382.

56. *Ibid*, p. 589.

and an open secret that corruption is a necessary concomitant of courts and court affairs. A spirit of frustration, so to say, prevails everywhere. The various kinds of payments to most of the court employees of the present day has been too well-known to everybody who has had ever anything to do with court business to require any re-iteration. Another instructive analogy is furnished by the control system which, as the legacy of the second World War, has supplied another fruitful source of corruption. The more stringent the rules and the more deterrent the punishment, the greater is the amount of bribes and the more frequent are the occasions for offering them. In these days of inflation, the bribe-givers do not mind to pay the bribe provided they can have the necessary permit or the desired commodity. Hence it is usually seen that there is no dearth of goods for those who can approach the proper quarters in the appropriate manner. It is, however, not hereby meant that Governments connive at these practices. This is clearly farthest from their intention As a matter of fact, all Governments are trying their level best to check this corruption and bribery, creating anti-corruption departments and by employing police of the special Intelligence Branch. This is a pardonable diversion only to illustrate the point that the more complicated the administrative machinery, the greater is found to be the scope for corruption. The administration of both civil and criminal laws offers concrete cases of corruption and ill-practices—at every stage of the litigation. But in a criminal case there is a greater scope for corruption and extortion, specially where the accused persons are liable to be sent to Hajat or to be sentenced to imprisonment. It does not require much reflection to see that the introduction of the elaborate legal procedure of England into India was actually unsuitable to a degree.

5. The most important instruments responsible for the development of Hindu law during the British period

Legislation and adjudication were the two most conspicuous instruments that were vitally responsible for the steady and systematic development of Hindu law during the British rule, particularly from the later part of the 19th century. Every piece of legislation was more or less subject to criticism and protest by one section of the public, whereas it was supported by another section of it. That some of these legislations were unmixed blessings for the country now goes without saying. As for instance, the Sati-rites (the practice of burning widows with their dead husbands), the custom of throwing children into the Ganges or the seas

and the institution of slavery were rightly abolished by the British rulers through the help of legislation. Even in these cases also the agitation was not inconsiderable against the passing of the relevant Acts. It is, however, more or less true that in every case of similar legislation, the foreign administrators were supported by a strong and considerable section of the public. Regarding some other legislative Acts, it might be said that the utility of their enactments was rather debatable on principles. In any case, the shrewed legislators did not undertake any enactment which was not backed by at least a large section of the public. The question of adjudication was somewhat different. The changes that were brought by adjudication were not direct and explicit, as the changes introduced by legislation. The changes resulting from adjudication could not at once attract the notice of the lay public on account of their highly technical character and the most scholastic nature of their discussion. Some adjudication also gave rise to public opinion and public criticism which could not be altogether ignored or brushed aside by the foreign administration. Whether the changes brought about by the British rulers in the shape of legislative Acts and decided cases were exclusively good or bad or mixed for the Hindus, is a question which cannot be fully answered by jurisprudence alone. A correct answer will depend on the religious, social and cultural sentiments of the people. Nevertheless it can be observed in the most general way that the changes in the sphere of both legislation and adjudication were more or less in the light of the needs and demands of the society, as it happened to assume a somewhat mixed character on account of its contact specially with the Western education and the Western civilisation from the middle of the 18th century. In this context, we shall discuss some of the most important pieces of legislation and some principles of legal topics that have been adjudicated upon by the courts under the British administration of Hindu law, noticing at the same time, the net effect produced on the entire system of Hindu law. As regards the ultimate consequences produced on Hindu law, both legislation and adjudication played almost analogous parts—subject, of course, to the express and implied character of ushering in the changes into the society.

6. The Caste Disabilities Removal Act, 1850 and the Native Converts' Marriage Dissolution Act, 1866

Before the passing of the Caste Disabilities Removal Act which is also known as the Freedom of Religion Act, according to Hindu law and usage, if a Hindu renounced his religion or was excluded from the

communion of that religion or was deprived of caste, such renunciation, exclusion or deprivation would entail a forfeiture of his rights and properties. But after the passing of the Freedom of Religion Act, these consequences ceased to be enforced as law in the courts of British India.[57] Though by the Freedom of Religion Act, a Hindu does not lose any proprietory right on account of the simple conversion, yet he ceases to be a member of the joint family and becomes an outcaste. Generally speaking, he is to be governed by the rules of the newly embraced faith. A Hindu, for instance, after embracing Islam or Christianity will be governed by the Mahomedan or the English laws ; but in cases of established customs, he may be governed by his former[58] laws. By a mere conversion, a Hindu cannot avoid his civil liabilities or obligations. A Hindu, for instance, by the mere act of his conversion cannot have his former marriage dissolved without the necessary legal proceedings under the Act XXI of 1866 (The Native Converts' Marriage Dissolution Act). If without dissolving the former marriage, a Hindu convert to Christianity marries again, his second marriage will be held as invalid. It has also been held in a Madras case[59] that the children of a Christian woman by a Hindu husband will not be governed by Hindu law, though they may have been brought up as Hindus. As regards inheritance and succession, the children of Hindu women by Europeans are to be governed by the Indian Succession Act. In other matters, they will be governed by Hindu law, if they follow the Hindu manners and customs. But if they are Europeanised in all respects and for all purposes, they will cease to be governed by Hindu law. In such cases, they will be governed by justice, equity and good conscience. The Freedom of Religion Act, as its very name implies, was passed to encourage freedom of religious conviction, based on the accepted principles of tolerance and non-interference with religious affairs. This Act was a necessity when there were many cases of conversion, specially to Christianity, as the result of the new impact between the Christian religion on the one hand and the Hindu religion on the other. The other Act, viz., the Native Converts' Dissolution of Marriage Act, was deemed necessary as a corollary to or an appendix of the Freedom of Religion Act, in order to supply the procedural provision for giving full effect to the Freedom of Religion Act in all its consequences.

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57. Khunnilal v Govind Krishna (1911) 33 All.356 ; Chedambaram V Ma Nyein Me (1928) 6 Rang. 243.

58. Abraham V Abraham. 9 M. I. A. 195.

59. The Government of Bombay V Ganga (1880) 4 Bom. 330 ; A-G of Madras V Anandacari (1886) 2 9 Mad. 496.

7. The Hindu Widows Re-marriage Act, 1856

The next important legislative enactment for our purpose is the Hindu Widows Re-marriage Act of 1856—which legalised the re-marriage of Hindu widows in certain cases. As regards widow re-marriage, Hindu law presents a very fitful history. The institution of widow re-marriage seems to have been as old as, if not older than, the Ṛigveda. One ṛic[60] of the Ṛigveda, when translated, runs thus :

> "Let the widows without subjecting themselves to the tortures be united with husbands of their own choice."

But after the Vedas, that is, at the time of the Smritis, the practice of widow re-marriage was generally discarded, until it was again revived as the result of the agitation of the great-souled Iśvar Candra Vidyāsāgar which was eventually followed by the above legislative enactment. The said Act legalised widow re-marriages, under certain circumstances. But before the passing of the Act, widow-remarriages, were prevalent only among certain classes of people of certain localities. The credit of legalising widow re-marriages should be wholly given to the unreserved activities of the late Vidyāsāgar who had to leave no stones unturned for removing the distress of the Hindu widows. Thus three distinct stages can be clearly marked in the evolution of the institution of widow re-marriage in Hindu law. In the first stage, that is, in the Ṛigvedic period, widow re-marriages were in vogue; in the second stage, that is, at the time of the Dharmaśāstras, the institution seems to have somehow disappeared; but inspite of this disappearance, the ghost of the institution could still be traced partly in the system of Niyoga and partly in the sanction of Manu given to the younger brother to marry the bride who was betrothed to his elder brother, after the death of the latter, before the celebration of the marriage. However, from the practical standpoint, the custom of widow re-marriage became almost obsolete at the time of the Smritis. Hence it was advocated in the Smritis that the re-marriages of widows were not sanctioned by the sages. Manu, for instance, says that in the Vedas, there was no provision for the re-marriages of widows. The conservative instinct against widow re-marriage was so much confirmed that during the period subsequent to those of the Dharmaśāstras, all were under the impression that the institution of widow re-marriage was really against the injunctions of the Śāstras. It is only for this reason that the late Vidyāsāgar had to face so vehement an opposition from all quarters.

60, Ṛigveda, X, 18, 7.

But the tendency of the modern society, particularly the advanced section of it—is to encourage widow re-marriage. Specially the girl widows without any pleasure of married life on account of no fault which is their own, have at length greatly attracted the attention of the society to their distress. The society also has been taught to become tolerant, little by little, of these so-called irregularities. Various attempts are being made to ameliorate the condition of the Hindu widows. Thus the Sarda Act has indirectly checked the multiplication of girl widows. The Hindu Women's Right to Property Act also had distinctly improved the lot of the Hindu widows.

8. Act III of 1872, Act XXX of 1923, Act XL III of 1954 and the Arya Marriage Validation Act XIX of 1937 ; The Hindu Marriage Act, 1955.

In India, law and religion are almost inseparably connected. Hindu law does not usually tolerate intercaste marriage, except for legislation though such marriages seem to have been recognised by the Dharmasūtras and the Dharmaśāstras. From this aversion to intercaste marriages, it is apparent as to what would be the logically consistent attitude of Hindu law towards marriages between parties professing different religion. As they could not foresee or anticipate the present complexity of the Hindu society in connection with varities of the people adhering to differant religions, the makers of the ancient Hindu śāstras hardly made any provisions of rules explicit or implicit for the marriage of parties belonging to different religious faiths. The few provisions that we come across at present in Hindu law are mainly statutory laws, passed during the British administration of the country. Thus by the Act III of 1872[61] parties belonging to different religious schools might inter-marry, provided that they declared themselves to be neither Hindus, nor Mahomedans nor Christians and also that those marriages were duly registered. Again by Act XXX of 1923 which is known as Dr. Gour's Bill, the Hindus could marry even without ceasing to be Hindus. The Act of 1872, as amended by the Act of 1923 has been repealed and replaced by the Act of 1954. If the marriage is celebrated under this Act, a Hindu would be considered to be separated from his coparceners and would be governed by the Indian Succession Act, so far as succession is concerned. This is after all a curious position. Though he is legally recognised as a Hindu, the Hindu law of inheritance, succession and the joint family system would not apply to him. In the contempla-

61. For the details of the Special Marriage Act, (XLIII) of 1954, and the Hindu Marriage Act, 1955, Vide supra, chapter XV.

tion of law at least there is no change of faith in this case. The Arya Marriage Validation Act also has provided by section 2 that "notwithstanding any provision of Hindu law, usage or custom to the contrary, no marriage contracted whether before or after the commencement of this Act between two persons being at the time of marriage, Arya Samajists shall be invalid or shall be deemed to have been invalid by reason only of the fact that the parties at any time belonged to different castes or different sub-castes of Hindu or that either both of the parties at any time before the marriage belonged to a religion other than Hinduism."

9. Act XXI of 1870 (Hindu Wills) ; Act V of 1881 and the Indian Succession Act

Wills were originally unknown to Hindu law, so much so, that no synonym for will was to be found in the whole of Sanskrit literature. But decided cases and legislation have been ultimately responsible for having brought into existence the institution of wills in all its aspects. This is an apt illustration where some material and helpful innovation was made for Hindu law during the British rule by means of adjudication and legislation. The observation of the Privy Council[62] regarding the introduction of wills in Hindu law is very instructive : "It is too late to contend that because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property. Decided cases, too unmerons to be now questioned, have determined that the testamentary[63] power exists and may be exercised at least within the limits which the law prescribes to alienation by gift *inter vivos*".

10. The Indian Majority Act, 1875 : The Guardians and Wards Act, 1890 ; The Hindu Inheritance (Removal of Disabilities) Act, 1928 ; The Hindu Law of Inheritance (Amendment) Act, 1928 ; The Hindu Women's Right to Property Act (XVIII of 1937) ; The Hindu Minority and Guardianship Act (XXXII) of 1956 ; The Hindu Succession Act, 1956.

The first Act, referred to above, fixed the age of majority on the completion of the 18th year and it applies to the Hindus except in matters of marriage, divorce and adoption. These matters will now be governed by in Hindu Minority and Guardianship Act (XXXII) of 1956. The

62. Beer Pertab V Rajender Pertab (1867) 12 M.I.A, 137.

63. See ante.

second Act, referred to above, applies to Hindus only when a guardian has got to be appointed by the court. The last three Acts of which the last two have been repealed by the Hindu Succession Act, 1956, applied to cases where some important modifications had been made of the general provisions to be found in the original Hindu law. The Hindu Inheritance (Removal of Disabilities) Act, 1928 has removed certain disabilities which according to the textual provision of Hindu law excluded a number of Hindus from inheritance and from a share on partition. The Hindu law of Inheritance (Amendment) Act also had made some important modifications on the order of succession in original Hindu law. Thus according to the provision of this Act, the son's daughter, the daughter's daughter, the sister and the sister's son had been recognised as heirs next after the father's father and before the father's brothers. The Act XVIII of 1937 which came into force on the 14th of April, 1937, provided for many new rights on the parts of widows "striking at the very root of the Mitākṣarā". The so-called perpetual disability of women also had been rightly ignored. The topics, covered by the above statutes, have got to be understood subject to the provisions made by them. As a matter of fact, this is true of the whole of Hindu law which was recognised as such by the British Indian Courts which were, however, authorised to apply the Hindu law to the Hindus only on account of some special provisions made by the statutes of Parliament and by Imperial and Provincial legislature. Throughout British India, questions regarding marriage, inheritance, succession and religious customs and usages were to be governed by Hindu law except in so far as they had been altered or modified by the legislature including the recent legislation on Hindu law. Besides there are some other matters of Hindu law which are governed by either express legislation or justice, equity and good conscience.

11. The Transfer of Property Act, 1882, as amended by Acc XX of 1929 ; The Indian Contract Act ; The Indian Evidence Act ; The Indian Penal Code and Civil and Criminal Procedure Codes

The above Acts form a group of legislative enactments whereby the British administrators in India wanted to introduce and promulgate a body of laws which could be applied in common with very little reservation to all the inhabitants of the country consisting of Hindus and Muslims along with others ignoring and over-riding the provisions that might have been made by the personal systems of Hindu and Muslim laws. The intention of and the policy for introducing such common principles

and procedure of law have been already discussed.[64] The Transfer of Property Act of 1882, as amended by Act XX of 1929, supersedes the whole of pure Hindu law, in relation to transfer of ptoperty excepting certain matters contained in section 129 of the said Act. By the Transfer of Property (Amendment) Supplementary Act XXI of 1929, the Madras Act of 1914 and 1921 and the Hindu Disposition of Property Act, 1916 relating to transfers and bequests, made in favour of unborn persons, have been considerably and materially amended. The entire law of contract[65] has been modified subject to the recognition of Damdupat in some places.

12. Child Marriage Restraint Act XIX of 1929, as amended by Act VII and XIX of 1938

This Act also greatly modified the original provisions of the pure Hindu law. There was never any minimum age limit, for the marriage of boys and girls according to the provisions of the original Hindu law. But child marriage or rather early marriage was generally advocated and encouraged. At the same time, in recent times, there is also a tendency among the educated and advanced people for celebrating late marriages, giving reasonable opportunity for the physical and educational developments of the parties. According to some of the sages, early marriages were so much encouraged that girls were recommended to be given in marriage even when they would run about naked. It was also regarded as a sin on the parts of the parents and guardians to allow their daughters to remain unmarried even after the attainment of puberty. From several other provisions[66] it was clearly indicated that early marriage was regarded as wholesome according to the Śāstras and the Śāstric laws. Hence the Child Marriage Restraint Act, to a very great extent, went against the general spirit of the orthodox Hindu conception of marriage laws. Naturally, therefore, there were much agitation and criticism even against the Child Marriage Restraint Act. Early marriage within some reasonable limits might have some recommendations of its own, but extreme forms of child marriages can by no means be supported.

13. Hindu Gains of Learning Act (XXX) of 1930

Before the passing of the Hindu Gains of Learning Act in 1930, two principles were clearly established. According to one of them, the

64. The Hindu law of contract has been superseded by the Indian Contract Act. But the law of Damdupat has not been fully abolished. It is still recognised in the Bombay Presidency and the Fresidency town of Calcutta.

65. See ante chapter X.

66. The points have been discussed with reference to the different sages. Vide ante, chapters V, VI and VII.

income earned by a member of a joint family by the practice of a profession or occupation requiring special training was regarded as joint family property; and according to the other, the gains made by the personal labour without the aids of the joint family funds by a member of joint family who was maintained out of the joint family funds but received no more than ordinary education suitable to his position as a member of family were to be deemed as the self-acquired property of such member. The courts in British India interpreted the term "science" to mean special, as contradistinguished from ordinary learning. It was thus held that special learning alone imparted at the cost of the joint family funds could make the property joint. Some of the Hindu sages insisted on charactercising the property as joint and as such liable to be partitioned on the ground that one brother looking after the family of another brother receiving training which enabled him to acquire property later on should be held entitled to a share of the acquisition. The matter has now become only academic after the Act of 1930 which declares all acquisitions to be self-acquired and not subject to partition under any circumstances. Thus before the passing of the Act, under certain circumstances, the acquisition could be regarded as joint and liable to partition. According to the preamble of the Hindu Gains of Learning Act, also it was said that the enactment was made "to remove doubt and to provide a uniform rule as to the right of a member of a Hindu undivided family in property acquired by him by means of his learning." According to the provision of section 3 of the Act, "notwithstanding any custom, rule of interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of (a) his learning having been, in whole or in part, imparted to him by any member living or deceased of his family or with the aid of the joint funds of his family or with the aids of the funds of any member thereof, or (b) himself or his family having while he was acquiring his learning been maintained or supported wholly or the part by the joint funds of his family or by the funds of any member thereof." The recent legislation on Hindu law on marriage, adoption. succession etc. will be discussed in details in the next chapter.

14. Adjudication during British rule and its effect on Hindu law

If legislation played an important part in the development of Hindu law, a still more important part was played by the decided cases in its re-orientation. The effect of legislation was direct, but that of adjudication was indirect — under the garb of

interpretation. Most of the judges were — at least originally — strangers to this country and to the usages and literature thereof and as such they had to depend on others for interpretation and explanation of the original Sanskrit texts which enshrined the Hindu law. Though the employment of Hindu Law Officers to instruct the judges as experts was the only plausible measure, still it must be said that it was not as succeesful as it was expected to be. Hence on many occasions, the interpretations, put on the original Sanskrit texts, were not always strictly in keeping with the real spirit of Hindu law. Two exclusive views are generally held on the effect of adjudication on Hindu law by the foreign judges. According to one such view, the effect has been the introduction of many European principles and ideas affecting the social and religious institutions of the Hindus. The advocates of this view illustrate their contention, among other things, by referring to the individualistic concepts which militate against the conceptions of the joint Hindu family. According to the other view, the natural growth of Hindu law was arrested at the hands of the European judges, with the result that Hindu law was made to contract a rigidity unknown to it before. According to this school of thinkers, Hindu law was originally administered mainly by local tribunals which could be accommodating enough to adapt the law according to the growing and changing needs of the age or the society; but when the foreign judges began to administer Hindu law, they depended solely on the texts which became more and more stereotyped not to admit of any innovation, dictated by the spirit of the growing age. But it appears to be more correct to say that without being mutually exclusive, the two theories, referred to above, were supplementary to each other. It is true that certain Western concepts and principles were imported into Hindu law consciously or unconsciously. Again, on many occasions, foreign administration of justice was to a great extent responsible for a sort of rigidity which might have been very well dispensed with by the local tribunals. The introduction of foreign elements was almost a necessary concomitant of the close contact between the two distinct civilisations. On the whole, it might be said that the changes that were introduced were more or less in keeping with the spirit of the time though not always in keeping with the orthodox ideas of the country. And for this, the law courts alone were not responsible. The law courts also were influenced by the general conditions of the society then prevailing. It is no gainsaying the fact that the British administration in India actually interfered with Hindu law and exerted some positive influence on it. In this sense, the British administration was considerably different from the Muslim administration. The effect of adjudication on Hindu law can be

best appreciated with reference to the following, among other important topics, to wit, (a) justice, equity and good conscience, (b) *factum valet*, (c) gains of learning, (d) debts and alienation, (e) adoption of an only son and the effect of adoption in general, (f) the piṇḍa theory, (g) absolute right of the father to alienate property according to the Dāyabhāga school, (h) wills and gifts *inter vivos* and (i) the equalisation of the position of female heirs in the Mitākṣarā as well as the Dāyabhāga school. Each of these topics will be discussed one by one.

15. (a) **Justice, equity and good conscience**

Immense has been the effect of this juridical expression in the development of Hindu law. The essential ideas of justice and equity were always working in the Hindu jurists, even from very early times ; but this compendious expression acquired a peculiar meaning at the hands of the British administrators who understood by it the principles of English law, as far as they were applicable to Indian circumstances.[67] This was undoubtedly an arbitrary and artificial connotation, attributed to the above legal expression. The true import of justice, equity and good conscience should have been strictly derived from the comparison of the laws of the diffreent countries, morality and laws of nature. It was necessarily too narrow a conception to have looked to only one system of law, viz., English law, for formulating a body of principles based on equity and justice, unlike the early Roman Praetors who took recourse to the *Jus Gentium* for a similar purpose. The expression justice, equity and good conscience served as a rule of substantive law even from a very early period of the British rule in India. When the increasing work of the Sadar Diwani Adalat was found to take up more time than the Governor General and Members of the Council could spare from their other duties, a separate judge was appointed to this court on October 18, 1780. This new judge was no other than Sir Elijah Impey, the Chief Justice of the Supreme Court. The new judge's first act according to Field was to draw up a Regulation consisting of 95 sections which consolidated the usual portion of all previous rules with proper principles of procedure, so as to make a simple code for the Mofussil courts : "He first provided justice, equity and good conscience as the rules of substantive law, to be administered in civil cases not otherwise provided for... ... a provision which is yet in force."[68]

67. Dada V Babaji, (1865) 2B H. C. 36, 38 ; Waghala Rajsanji V Shekh Masludin, (1887) 11 Bom. 551, 561. Also see P 6 (Foot note) of Pollock and Mulla's Indian Contract Act, 4th Edn.

68. Introduction to the Regulations of Bengal, Field, P, 174 (Foot note).

Occasionally, of course, there was some reaction against the application of this principle. It was rightly held in Gopee Kristo V Ganga Persaud[69] that the rule of advancement being one of English positive law and not founded on natural justice was not to be imported into India where different consideration would apply owing to Hindu ideas of morality and religion. But for narrowness and sectarianism, comparative estimate of different principles prevailing in different systems and the acceptance of the best of them cannot be objected against from the juristic standpoint. The compendious juristic expression "justice, equity and good conscience" has a very instructive and significant history behind it and it proved as one of the most convenient channels for introducing English principles into the Indian system of law in general and the Hindu system of law in particular. According to Warren Hasting's judicial plan of 1772, the Diwani Adalats were directed to decide all cases of inheritance, marriage, caste and other religious usages and institutions according to "the laws of the Koran with regard to the Mahomedans and the laws of the Shaster with respect to the Hindus." As the persons who were entrusted with the administration of justice among the Hindus and the Muslims were ignorant of their personal laws, customs and institutions, it was further provided by Warren Hastings, through his plan of 1772, that Kazis and Pandits would be appointed to help the foreigners for explaining the laws of the Koran and the Shaster. This arrangement was inadequate from two very important standpoints: In the first place, the topics covered for the laws of the Hindus and the Muslims were not exhaustive and in the second place, there were many other communities besides the Hindus and the Muslims, such as, the European British subjects, Anglo-Indians, Armenians, Parsees, French, Portugese, the East Indians and the native Christians who could not be governed by the provision, made by the plan of 1772. Hence it had to be provided by the plan of 1781, at the instance of Impey, that "in all cases, within the jurisdiction of the Mafusil Diwani Adalats, for which no specific directions are hereby given, the respective judges thereof do act according to justice, equity and good conscience." (Section IX of the Regulation of 1781). Similarly section XCIII of the same Regulation provided that "in all cases for which no specific directions are hereby given, the judges of the Sadar Diwani Adalat do act according to justice, equity and good conscience." Justice, equity and good conscience originally meant only the discretion of the judge which was absolutely unfettered. This wide discretion, given to foreign judges, could very well merit the rebuke that

69. 6 M. I. A. 53.

it "varied as the judge's foot." The judges thus had to depend on different resources at different times. Sometimes they would rely on the native Law Officers, sometimes they would try to apply the law according to the customs and usages of the people and sometimes they would apply the principles of English law to the Indians. The borrowing of the last-named principles was much more accelerated after the creation of the High Courts, when all the judges used to be English men including trained English lawyers. It was at this time particularly that justice, equity and good conscience came to be more or less identified with the English principles. The unfettered discretion was necessarily responsible for many uncertainties and conflicts ; and this state of things continued for about eighty or ninety years beginning from 1781 upto the time when the most important branches of Indian law were codified. Codification alone could rid the system of its vices in the form of uncertainty and confusion on the one hand and the borrowing of English principles on the other. Thus Lord Salisbury in his despatch to the Government of India, dated the 20th January, 1876, rightly remarked that "the only way of checking this process of borrowing English rules from the recognised English authorities is by substituting for those rules a system of codified law, adjusted to the best native customs and to the ascertained interest of the country and similar was the view held by Sir James Stephen.[70] The judges were not to blame so much, as they had no other alternatives open to them under the circumstances. Hence the Privy Council also rather encouraged the application of English principles to Indian cases. The highest tribunal of the time specifically laid down that justice, equity and good conscience meant nothing else but the rules of English law, though English law was not obligatory upon the judges of the courts in Mafussil.[71] "Though justice, equity and good conscience," says Sir James Stephen,[72] "are the law which Indian judges are bound to administer, they do in point of fact resort to English law books for their guidance on questions of this sort and it is impossible that

70. "Well-designed legislation is the only possible remedy against quibbles and chicanry. All the evils which are dreaded from legal practitioners can be averted in this manner and in no other. To try to avert them by having the law undefined and by entrusting judges with a wide discretion is to try to put out the fire by pouring oil upon it. Leave a judge with no rule or with one of those leading rules which can be twisted in any direction and you at once open to the advocate every sort of topic by which the discretion of the judge can be guided. Shut the lawyers' mouth and you fall into the evils of arbitrary Government" ...... Gazette of India Supplement, May 4, 1872, p. 529.

71. Varden Seth Sam V Luckpathy, 9 M. I. A. 303.

72. Supplement to the Gazette of India, May 4, 1872, p. 535.

they should do otherwise unless they are furnished with some such specific rules as this Act (Contract Act) will supply them." Sometimes when the communities had any definite law for them, the courts would choose to adopt the most convenient method of applying the respective laws of the communities in question, when both the parites happened to belong to the same community. Thus the courts applied French law to the French.[73] Portugese law to the Portugese,[74] Armenian law to the Armenians,[75] Parsian law to the Parsees[76] and Jewish law to the Jews.[77] But difficulties were felt with respect to the East Indians[78] and the Indian Christians. The persons belonging to the latter community presented some peculiar difficulties. They were originally Hindus or Muslims, but later on converted to Christianity. They had no specific law for governing them ; hence questions of inheritance etc. arising among them were decided on a consideration of "the usage of persons situated as the parties who were described as Christians whose ancestors are of Hindu stock and the usage in their particular family, as indicated by the acts of the parties and their predecessors in respect of their properties since they have belonged to the Christian community......" on the grounds of justice, equity and good conscience. The Privy Council also held that the convert "may by the course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom."

In view of the different communities and the different personal laws, there could not be any uniformity in the legal system.[79] The three Supreme Courts and the four Sadar Adalats were functioning almost independently of one another. Thus it could be easily said that "Five men each under a different law may be found walking and sitting together." Hence it was no wonder if the judges turned to English law

73. Durand V Boilard, 5 Beng. Sad. Report. 176.

74. Joanna Fernandez V Domigo de Silva, 2 Beng. Sad. Rep. 227.

75. Aratoon V Aratoon, Indian Decisions, (Old Series) VIII. 469.

76. Moda Kaikhooscrow Hormusjee V Coover Bhaee, 6 M. I. A. 448.

77. Musleah V Musleah, I. S. C. R. Beng. 894.

78. 9 M. I. A. 240.

79. The first Law Commission commenting on the prevailing system observed, "Though British India may appear on the one hand to have less need for a *lex loci* than any other country, because the great mass of its population consists of two sects whose law is contained in their religion, yet on the other hand, there is probably no country in the world which contains so many people who, if there is no law of the place, have no law whatever."

for inspiration. It was justly said by Sir Barnes Peacock, "Now having to administer justice, equity and good conscience, where are we to look for the principles which are to guide us ? We must go to other countries where equity and justice are administered upon principles which have been the growth of ages and see how the courts act under similar circumstances and if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot go wrong in following them."[80] The Supreme Courts were directed to apply the Hindu law and the Mahomedan law to the Hindus and the Muslims respectively only in certain topics. So they were not bound to apply the personal law of other communities even in the litigation among themselves. In the result, it was English law that was applied even to the Jews[81] and the Armenians.[82] The Supreme Courts perhaps rightly concluded that they were not competent enough to administer personal laws of the parties except in the case of Hindus and the Mahomedans. So in all other cases leaving the Hindus and the Mahomedans, the Supreme Court used to apply English law which was regarded as the *lex loci* in the three Presidency towns. Thus it was under this peculiar set of circumstances that the principles of English law were being invoked into India to modify the personal systems of the Indian law to a very considerable extent. On this historical background, the Privy Council had to observe that "justice, equity and good conscience" had been generally interpreted to mean the rules of English law, if found applicable to Indian society and circumstances. Codification, of course, affected the doctrine to some extent : but codification itself again was greatly influenced by the principles of English law.

(b) *Factum Valet*

The doctrine of *factum valet quod fiere non debuit* was wrongly supposed to have been enunciated and relied upon by Jīmūtavāhana for giving absolute power of alienation to a father according to the Bengal school. As it was clearly pointed out by Dr. J. N. Bhaṭṭācāryya, the mistake was due to the wrong translation of the text of Jīmūtavāhana—Vacanaśatenāpi vastunonyathākaraṇāśakteḥ—as "a fact cannot be altered by hundred texts." The term "vastu" ought to have been correctly rendered as thing and not fact. Facts and things are not identical. This so-called doctrine of *factum valet* was also extended to other topics of

80. (1868) 9 W. R. 230, 232 and (1897) 24 C 908, 930.

81. Musleah V Musleah, S. C. R. Beng. I, 894.

82. (1887) 14 I. A. 89, 96 ; Dada V Babaji, (1868) 2 Bom H. C. R. 36, 38 ; Webb V Lester, (1865) 2 Bom H. C. R. 52, 56.

adoption and marriage etc. The point was most ably discussed by Dr. Bhaṭṭācāryya to explain the error. In an appreciation of that discussion the whole topic has been nicely summarised in this way:[83] "Now what Jīmūtavāhana means by the doctrine is that the essential nature of a legal right cannot be altered by a text. He (Dr. Bhaṭṭācārya) first points out that a father, so long as he is alive, is the owner of the property and as according to the Hindu jurist one of the essential characteristics of ownership is the power of absolute disposition, a father has a power of disposing his property without the consent of his sons. But against this conclusion Jīmūtavāhana finds a text of Vyāsa which apparently forbids such alienation; he shows that the text is meant simply as moral prohibition. He does this on the strength of a grammatical discussion the spirit of which is impossible to present in a purely English dress. He then says that the essential nature of a thing cannot be altered by a hundred texts, evidently meaning thereby that as the ownership of the father confers on him a power of sale, he has the power to effect the sale notwithstanding a hundred texts and texts cannot alter the nature of a thing which has real existence, such as, ownership has........... Had he held the doctrine why should he take the trouble to prove that the texts are not a legal but a moral prohibition only?"

(c) Gains of learning

This topic was subjected to heated controversies and the British Indian courts also differed in their judgments basing their conclusions on the different interpretations of the different texts. At this uncertain stage the entire dispute was set at rest by legislature to which reference has already been made. Vide the Hindu Gains of Learning Act, 1930.

(d) Debts and alienation

According to the strict Mitākṣarā theory, the family property is not liable for the personal debts of a member. But a number of decisions, pronounced by the British Indian courts, have introduced two innovations which have most substantially affected the Mitākṣarā conception of property. According to one of those innovations, a son's pious duty has been translated into legal duties and as such the entire family property has been made liable for the debt of the father, provided it is not an immoral one.[84] According to the second innovation, an undivided coparcenary interest in the family property has been made saleable in execution of a

83. The Statesman, 24th March, 1887.

84. Girdharee Lal V Kantoo Lal, I.I.A. 321.

money decree against him.[85] Thus the decided cases have gone far beyond the original Hindu law according to the texts. But there has been one wholesome restriction : the courts refuse to overlook and enforce the rule of Hindu law in favour of creditors of members other than the father.

(e) Adoption of an only son and the effect of adoption in general

According to the texts of Vaśiṣṭha and Śaunaka, an only son could not be given or taken in adoption. There was a wide difference between the different High Courts regarding the real nature of the prohibition. Some of the High Courts held the adoption of an only son to be valid while the others held it to be invalid. In this uncertain state of things, two cases went upto the Privy Council which decided that the adoption of an only son was valid. The prohibition enjoined by Vaśiṣṭha and Śaunaka was treated as merely recommendatory and not mandatory. This is a very clear illustration where the British Indian courts decided otherwise than the original text-writers. According to the general rules of adoption, an adopted son has been held by the British Indian Courts to have all the rights, and duties of a natural born son, subject to those which have been expressly withheld from him. "Adoption[86] has been spoken of as a new birth......... Nor is this expression a mere figure of speech. The theory involves the principles of a complete severance of the child from the family in which he is born.........and complete substitution into the adoptive family as if he were born[87] in it."

(f) The piṇḍa theory

It has been decided by the British Indian courts[88] that the piṇḍa theory or theory of spiritual benefit is the sole guiding principles of succession in the Bengal school. But a close examination of the 11th chapter of the Dāyabhāga will at once show that Jīmūtavāhana never exclusively relies on the theory of spiritual efficacy. Had the theory been true, the list of heirs would also include according to Śrīkriṣṇa Tarkālaṃkāra those offering piṇḍa at Gayā, those throwing the bones into the Ganges and also the son-in-law according to Dr. Bhaṭṭācāryya. On the contrary, many maternal relations would also have been excluded from the list of heirs strictly according to the piṇḍa theory. Above all, Manu clearly provides that the power to give piṇḍa follows the course of inheritance and not

85. Deendayal V Jugdeep, 4.I.A. 247.
86. Nagindas V Bachoo, 40 Bom. 270 (P.C.)
87. Krishnamurti V Krishnamurti, 50 Mad. 508 (P. C).
88. Guru Govind V Anand Lal, (1870) Beng. L. R. 15 (F. B.)

vice versa. Generally speaking, Jīmūtavāhana advocated the piṇḍa theory only to justify a departure from the existing theory, without pushing it into its logical conclusions. But the subsequent followers of Jīmūtavāhana have done what he himself would not have done. In the result, the theory of consanguinity was altogether ignored and replaced by the theory of spiritual benefit. "The rule of propinquity," says Sarvandhikari,[89] "is the governing principle in succession not only in the Mitākṣarā school, but also, we are bold to affirm, in the Dāyabhāga school. It was simply to vindicate the great claim of propinquity that the author of the Dāyabhāga laid so much stress on the proper application of the doctrine of religious benefits. It was simply to give their proper places to the cognate kinsmen that he elaborated the theory of spiritual benefits." For the drastic changes of the law of succession, see the Hindu Succession Act, 1956.

(g) The absolute right of alienation by a father in Bengal

According to the original texts, a father in Bengal could not alienate the property without the consent of the sons. But the consent of the sons being inconsistent with the conception of full ownership, characterised by the absolute power of disposition, the courts came to decide that a father according to the Dāyabhāga school had absolute power of alienation. This theory also is largely connected with the doctrine of *factum valet*, discussed above.[90]

(h) Wills and gifts *inter vivos*

As it has already been seen, there was originally no conception of wills in Hindu law. It was solely by adjudication that the creation of will was recognised in Hindu law, as administered by the British Indian courts. Once the wills were actually recognised, their character and scope became co-extensive with gifts *inter vivos.*[91]

(i) Equalisation of the position of female heirs in the Dāyabhāga as well as the Mitākṣarā school

Although according to the Mitākṣarā, the property inherited by a woman from a male is to be recognised as her strīdhana, yet nowhere in that commentary it is said that such property becomes her absolute estate. On the contrary, in view of the relative texts of Yājñavalkya and Kātyāyana and the general doctrine of the Mitākṣarā according to which even males are without absolute rights over certain types of

89. The Hindu Law of Inheritance (Tagore Law Lectures), p. 750.

90. For a fuller discussion, see 15 (b) above.

91. For details, see the discussion of Hindu Wills Act above. Also see the Hindu Succession Act, 1956.

property it is only reasonable to maintain that the female who has inherited property from a male holds it subject to certain restrictions, although such property is characterised as strīdhana by the Mitākṣarā. On these considerations, the Privy Council has held in many cases[92] that it would be misleading to use the term strīdhana in the general sense; hence according to the Privy Council it would be convenient even in the Mitākṣarā school to restrict that term to the absolute estate of a woman as in the Dāyabhāga school, while describing the limited interest of a woman by the phrase "woman's estate." The above interpretation of the Privy Council is clearly unwarranted according to the Mitākṣarā, as in that school, even the property which a woman inherits from her husband is regarded as her strīdhana property. Strīdhana according to the Mitākṣarā devolves in the way, as prescribed by it. Hence a widow's interest would pass on her death to her own heirs and not the heirs of her husband. But in the view of the decisions of the Privy Council, referred to above, the point has become purely academic. Now after the passing of the Hindu Succession Act, 1956, all properties of women are to be regarded as their absolute properties.

(j) Adjudication regarding interpretation of the original texts on Hindu law

A special text or a special statute which forms an exception to a general text or a general statute should be construed strictly and confined only to cases falling clearly within it. Where a Hindu widow under the Mitākṣarā school dies without a child, leaving strīdhana property, an adopted son of her husband, taken in conjunction with another wife and a son of her husband born of a third wife, inherit as her husband's sapiṇḍas, the strīdhana property, in equal share. According to Briddha Gautama, the general rule is that an adopted son with good qualities and subsequently born natural son are equal sharers. To this general rule an exception has been suggested by Vaśiṣṭha who lays down that if after he has been adopted, a natural son is born, the Dattaka son shall take a fourth share. It was held that this exception shall not be extended to the property inherited from the step mother. It was thus observed: "Consequently we should not extend its application to cases not only not comprised strictly within its letter, but undoubtedly beyond its true spirit; in this connection we may bear in mind that Hindu jurists quite as much as English jurists (Ebbs V Boulnois (1875) L. R. 10 Ch.

92. Thakur Deyhee V Rai Baluk Ram, 11 I. A. 139; Bhugwandeen Dobey V Myne Baee, 11 M. I. A. 487; Debi Mangal V Mahadeo, 34 All 234 P. C.

APP 479 (484) ; Co. Litt. 299a) recognise the well-known canon of interpretation that a special text or statute forming an exception to a general text or statute should be construed strictly and applied only to the cases falling clearly within it ; the Mitākṣarā itself recognises the principle that where an exception exists to a general rule, the exception should be confined within the strictest limits, so as not to encroach unduly upon the rule ; Gangu V Charan (1907) I. L. R. 32 Bom. 275 ; Anadi V Hari, (1909) I. L. R. 33 Bom. 404, Dattaka Candrikā, sec V, 27 ; Mitākṣarā on Prāyaścitta, Ed. Mogha, p. 292."[93] The Privy Council also observed that the Hindu law contains its own principles of interpretation and questions arising under it cannot be determined on abstract reasoning or analogies, borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognised commentators. In deciding questions whether the expression 'bandhu' would be confined only to those three classes of bhinna gotra sapiṇḍas that were mentioned in the Mitākṣarā or whether any new class of heirs can be introduced under it and whether the word sapiṇḍa should be understood in a wide sense to include every person related by particles of the body or whether it should be understood in a restricted sense so as to exclude from inheritance every one related through females beyond the fifth degree and every one related through males beyond the seventh degree, it was held that the classes specified by Vijñāneśvara cannot be added to and the case of Girdharilal Roy V Government of Bengal[94] is no authority for the extension and also that the relation of sapiṇḍa ceases for purposes both of marriage and of inheritance after five degrees in case of relationship through females. "The limitation of five degrees," observes the Privy Council, "clearly applies and can only apply to the bhinnagotra sapiṇḍas. But it is contended that this limitation is confined to prohibition in respect of marriage. As it has already been observed, a part of the limitation appears to have been applied to the succession of samānagotra sapiṇḍas ; their Lordships are unable to see on what principle it can be said that the other part relative to kinsmen who are equally sapiṇḍas but belong to a different gotra or sons must be restricted to matrimonial affinity......... In absence of any authoritative text, their Lordships do not see their way merely on abstract reasoning to displace a view of the law which has received the recognition of the courts in India and which the

93. Per Mukherjee, J. in Gangadhar Bagla V Hiralal Bagla, (1916) 23 C. L. J. 387-88.

94. 12 M.I.A. 448. For the modified meaning of the word sapiṇḍas, see the Hindu Marriage Act (XXV) of 1955, section 3 (f).

District judge, an officer of great experience and learning says is accepted by public opinion."[95]

Again in a question whether under the Dāyabhāga school of Hindu law, the son or the married daughter is the preferential heir to the mother's ayautuka strīdhana, the decision was based upon the meaning of the expression kanyā, given by Jīmūtavāhana in connection with his quotation from Manu.[96] It appears that Śrīkṛiṣṇa and Raghunandana use the term as meaning daughter generally, but from the Dāyabhāga[97] it is clear that Jīmūtavāhana used it in the sense of unmarried daughter. In the above conflict the opinion of Jīmūtavāhana was accepted.[98]

Lastly, reference may be made to the case of Bhupati V Ram Lal[99] in which the question that was referred to the Full Bench was: "Does the principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it apply to a bequest to trustees for the establishment of an image and the worship of the Hindu Deity after the testator's death and make such a bequest void ?"

It was held on the construction of the expression dānohi cetanoddeśaviśiṣṭatyāgādeva[100] and comments thereon, read with Śūlapāṇi's and Raghunandana's discussions as to the nature of Shradh and gift etc. that the above principles of Hindu law does not apply to such a bequest. It was observed by Mookherji, J: "The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence[101] at the time of the death of the testator is based upon a double

95. (1914) 20 C.L.J. 573 (P C.), per Ameer Ali, J

96. Chapter IV, 2, 16.

97. Chapter V.

98 Prasanna V Saratsasi (1908) I.L.R. 36 Cal 86.

99. (1909) I.L.R. 37 Cal. 128 (F.B.).

100. Dayabhaga, Chapter I, 21.

101. In the famous Tagore case it was decided that a gift to an unborn person whether *inter vivos* or by will is invalid. After the passing of the Hindu wills Act, 1870, the question arose if this Act had changed the law so far as regards gifts made by wills. In the case of Alangamanjari V Sonamani, Garth, C.J. and White, J. held that the Hindu Wills Act applies to Hindus section 100 of the Indian Succession Act (of 1865) which provides that a gift to an unborn person is valid, if it gives him the whole interest. The questions would, therefore, have been answered in the affirmative, but for section 3 of the Hindu Wills Act which provides that "nothing herein contained shall authorise any Hindu to create in property any interest which he could not have created before Ist Sept., 1870." As before that date an unborn person could not have taken a bequest, his incapacity has not been removed by the Hindu Wills Act and gift to an unborn person remained invalid. This law, however, has been altered by a statute

fiction, namely, first, that a Hindu deity is for all purposes a juridical person and secondly, that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated and the second is inconsistent with the first principles of jurisprudence.........The Hindu Law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose placed extra-commercium and is entitled to special protection at the hands of the sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments."

(k) Adoption of daughters in Hindu law

The two treatises, the Dattaka Mīmāṃsā and the Dattaka Candrikā exculsively deal with adoption in its various phases and though originally they were not recognised as authoritative expositions of the subject, yet finally their authority was established by the Privy Council after the decisions of the two famous cases, namely, Bhagwan Singh V Bhagwan Singh[102] and Sri Balusu V Sri Balusu.[103] Both treatises uphold the religious theory of adoption in Hindu law. Hence they ascribe the cause of adoption to the religious need of offering oblation to the father and other ancestors after their death. Both of them preface their expositions with the oft-quoted couplet of Atri which runs thus :

> "Aputreṇa sutaḥ kāryyo yādriktādrik prayatnena
> Piṇḍokakriyāhetornāmasaṃkīrtanāyaca."

That is, by a man, destitute of sons, must a substitute of any description for the same be adopted for the sake of funeral cake, water, solemn rites and the celebration of name. The idea of the Hindu jurists, such as, Manu, Yājñavalkya, Nārada, Brihaspati, Viṣṇu and others was that by the birth of a son, a man could pay back one of the three-fold debts to which he was subject from the very moment of his birth. The following text of the Śruti is very instructive in this context :

"Jāyamāna ha vai Brāhmaṇastribhirriṇaiḥriṇavān jāyate. Brahmacaryena ṛiṣibhyo, yajñena devebhyaḥ prajayāpitribhyaḥ ; eṣa va anṛiṇī ya putrī, yajvā, Brahmacārī vā."

(Act XV of 1916) which provides that a gift to an unborn person is valid provided he is given an absolute interest and the gift conforms to the requirements of section 113 of the Indian Succession Act, 1925. This Act is, however, not retrospective, so that it does not validate any bequest made before 1916. Narsingh V Beti Mahalakshmi, 50 All. 375 (P. C.)

102. 21 All. 412 P. C.

103. 22 Mad. 398 P. C.

Similarly Manu[104] says that by a son, a man conquers the world, by a son's son, he enjoys immortality and by a grandson's son, he reaches the solar abode. A very significant description of the institution of adoption has been given by Brihaspati also as follows :

> "Ājyam vinā yathā tailam sadbhiḥ pratinidhiḥ kritaḥ
> Athaikādaśa putrāstu putrikaurasayorvinā."

That is, as the honest people substitute oil for ghee, so also there are eleven substitutes of sons in the absence of an aurasa son and a putrikāputra. Nanda Paṇḍita, the author of the Dattaka Mīmāṃsā, further argues that omission to adopt a son by a sonless man is an offence. He says, "in omitting to adopt a son, an offence , even is incurred, for the precept of enjoining the production of a son being positive, it results that the contravention of it is the cause of an offence, for the defect of any son in general, exclusion from heaven is declared in the texts."[105] The word āpadi in the text of Manu[106] has been differently Interpreted by different authors. The term ordinarily means the distress in the form of sonlessness of the adopter. But the Mitākṣarā means famine etc. by the expression āpadi : "By specifying distress, it is intimated that the son should not be given, unless there is distress ; this prohibition regards the giver."[107] Similarly Kātyāyana also provides that during a season of distress the gift or even the sale of a son may be made ; otherwise the same must not be done ; this is the injunction of the holy institutes.[108]

It may be noted in this connection that the sages did not clearly mention whether daughters also could be adopted. It is Nandapaṇḍita who by interpreting the original texts of the sages concluded that the words putra, prajā etc. included sons and daughters as well. Thus adoption of sons included adoption of daughters also and as there may be twelve kinds of substitutes for the legitimate son, so according to Nanda Paṇḍita substitutes of daughters also can be made in the same way.[109]

104. IX, 137.

105. Dattaka Mīmāṃsā, I, 5, translated by Sutherland.

106. "Pitāmātā vā dadyātāṃ yamadbhiḥ putramāpadi
Sadris'aḥ prītisaṃjuktaḥsa jñeyo datrimaḥ sutaḥ."

107. Mitākṣarā on inheritance, Chapter I, Section II.

108. Dattaka Mīmāṃsā, I, 8 translated by Sutherland.

109. For further discussions on this point, vide ante, chapters VIII and IX. For the new law of adoption, see the last chapter of this thesis, (the Hindu Adoptions and Maintenance Act 78 of 1956).

16. Conclusion

Most of the deviations and innovations, referred to above, were not absolutely irrational. As a matter of fact, some of them were most useful expedients. Who can deny at this stage that wills are not serving one of the most important purposes in Hindu law, regarding the free disposition of property—though the original Sanskrit texts are silent about them? The gains of learning also to which the acquirer has been unequivocally declared entitled will go to encourage both learning and earning. The difference of opinion and the resultant confusion have been done away with by the relevant legislation. The piṇḍa theory, as supposed to have been advocated by Jīmūtavahana, had been found helpful in including some cognatic heirs in preference to some remote agnates. Similarly, the doctrine of *factum valet* has served a very useful purpose in distinguishing the mandatory and the recommendatory prohibitions. Thus without multiplying instances, it can be generally asserted that the modifications, effected during the British period, through adjudication and legislation on the original Hindu law were largely in consonance with the spirit of the society, resulting from the contamination of the Western and the Eastern civilisation. Orthodox adherence to the pure Sanskritic law would clearly be an anachronism at this day. Thus the Hindu law, as administered during the British rule, reflects, in a very large degree, the peculiar character of the Hindu society of the time. The three important stages in the history of Hindu law are really very significant and easily distinguishable. As it has already been seen, in the earliest period, Hindu law was speculated upon and enunciated by the Hindu sages themselves without any extraneous influence whatsoever; during the Mahomedan period, though there was in a sense an arrest of the growth of Hindu law, specially with reference to the external world or aspect, still the current was flowing internally giving an opportunity to the commentators to interpret the original Hindu law in their own characteristic way. Innumerable and extensive commentaries were the result of this age. Lastly, a definite foreign influence was exerted, resultant on the British administration in India. This continued upto the time of independence and thereafter, as it is still continuing without any appreciable change in any way. After independence, the most important epoch had been the introduction of the Hindu Code Bill which was ultimately passed in the form of some fragmentary Acts which will be discussed in the next chapter. Adjudication and legislation within reasonable limits are always wholesome and welcome. As a matter of fact, to an impartial observer, the spirit of the Hindu Code Bill and the ultimate fragmentary

Acts had been virtually for the acceleration of the tendencies that had already become manifest in the modifications, effected during the British rule. In the history of Hindu law, the changes never appeared to be too violent for the genius of its system, as it was always accommodating and subservient to the spirit of the age and the society.

CHAPTER XV

The Hindu Code Bill and its Fragments

1. The Hindu Code Bill

As it has already been said, the last and the most important epoch in the Hindu Legal History is the administration of Hindu law by the British rulers. Though this is the last epoch, still the last word has not been spoken in many topics of Hindu law. A revolutionary proposal was made to modify the Hindu law by the introduction of the Hindu Code Bill into the central Indian Legislature. The Bill had undoubtedly created the greatest sensation ; no other Bill was able to stir the people so deeply and strongly. The people of the country was equally divided for and against the Bill. The jurists, the experts and the laymen also had expressed themselves on it. Indeed, no other Bill could evoke so much criticism and agitation. The provisions of the Bill were not fraught with unmixed good or unmixed evil. Nevertheless, a comprehensive Code on Hindu law, as proposed, was sure to agitate the people who had got a time-honoured culture and tradition behind them. The Bill was regarded by its critics as a sort of challenge to the whole social and cultural structure of the Hindu philosophy. In the past also there had been some important changes in the Hindu Legal History; but as those changes were only piece-meal, the agitation could not naturally gather so mighty a momentum. The Bill had become specially significant when it was sought to be enacted in the wake of Indian independence. There were surely certain advantages as well as certain disadvantages of the provisions contained in the Hindu Code Bill and as a matter of fact, no Bill can be an unmixed advantage. The nature of the public opinion, expressed in this connection, might tend to show, according to the critics of the Bill, that it was neither absolutely imperative nor sufficiently useful. There cannot be any doubt that the Bill was largely the product of the influence of certain Western conceptions and institutions which are sometimes opposed to and often inconsistent with the original Hindu ideas. Naturally, whenever anything is attempted to be done per force, the resultant agitation will be too strong. Thereby it is not intended to assert that Hindu law does not require any change or modification ; there are indeed many topics which should undergo some important modifications. The only question is if the magnitude and the hour of the change could be regarded as the most opportune.

The British rulers, by means of administrative measures, legislative acts and judicial decisions, had no doubt exerted an immense influence in the development of Hindu law—unprecedented in its history. The modifications, thus effected during the British rule, were largely in consonance with the spirit of the society resulting from the contamination of the Western and Eastern civilisations. Orthodox adherence to the pure Sanskritic law would clearly be an anachronism at this day. Thus the Hindu law, as administered during the British rule, reflects in a very large degree the peculiar character of the Hindu society of the time. Whether the changes brought about by the British rulers were exclusively good, bad or mixed for the Hindus is a question which cannot be answered by jurisprudence alone. A correct answer will depend on the approach to the question from the standpoints of religious, social and cultural sentiments.

The Hindu Code Bill with its fragments was neither an imperative necessity nor an unmixed blessing. As a matter of fact, to an impartial observer, the spirit of the Hindu Code Bill was virtually for the accentuation or acceleration of the tendencies that had already been manifest in the modifications and innovations, effected by the British rulers. Nevertheless, adjudications and legislations, as it has already been said, within reasonable bounds, are always wholesome and welcome; in the history of Hindu law, the changes never appeared to be too violent for the genius of its system, as it was always accommodating and subservient to the spirit of the age and the society.

2. History of the Bill

The Hindu Code Bill was "the most comprehensive piece of legislation covering all the major branches of Hindu law. As early as in the year 1941, a Committee was formed by the then Government with Sir B. N. Rau as Chairman, to report on the desirability of codifying Hindu law. The report of the Committee recommended codification of Hindu Law in gradual stages and actually two draft Bills were prepared by them, one dealing with the law of intestate succession and the other with the law of marriage. After drafting these two bills, the Committee ceased to function. In course of the discussions of these draft bills, before the Assembly, the Government passed a resolution on 20th January, 1944 by which the Hindu Law Committee was revived with direction to formulate a code of Hindu law which would be as comprehensive as possible. The Committee began its work in February, 1944. The final Report of the Rau Committee together with the Hindu Code Bill was placed before the Cabinet on or about 24th March, 1947. The Bill was introduced in the

central Legislative Assembly on 11th April, 1947, and on 9th of April, 1948, the Bill was referred to a Select Committee. The Select Committee submitted their report on 12th August, 1948, suggesting certain changes and amendments. The motion for consideration of the Report came before the Assembly on 31st August, 1948. There were debates upon it at various intermittent sittings and finally on 19th of December, 1949, the House adopted the motion, "that the Bill, as reported by the Select Committee, be taken into consideration." Before the motion was adopted, the Prime Minister gave an assurance that before the Code was taken up for detailed consideration, an informal conference would be convened in which members of the general public would also be represented to discuss thoroughly the points regarding the Bill that were in controversy between the various sections of the Hindu community. In pursuance of this assurance, an informal conference was called and it held its sitting on various dates. As a result of the deliberations, the Government decided to move certain amendments to the Code at the appropriate stage and notice of these amendments was given by the Law Minister. The Hindu Code Bill next came up for consideration before the Parliament on 5th of February, 1951. Debate on clause (2) of the Bill began on 5th of February, 1951, and continued on the following two days without any conclusion being reached. It was taken up again in September, 1951 for clause by clause discussion. In course of these discussions the suggestion came from the Prime Minister that as there was little chance of the whole Code being enacted by Parliament within the short time available, it was desirable that a part of the Code should be passed in the present session and the part selected was that which relates to marriage and divorce. Eventually only four Clauses were passed and the matter ended there for the time being."[1] It was ultimately decided by Parliament to split in Hindu Code Bill or the measure into parts or fragments. The first fragment was the Hindu Marriage and Divorce Bill (No. VII of 1952). Another Bill was introduced in the Upper House, the Council of States, on 28th July, 1952 in the form of the Special Marriages Bill (No. III of 1952). Though strictly speaking, the Special Marriage Bill was not a fragment of the Hindu Code Bill, still it comprised many topics of the latter specially with reference to marriage which had been excluded from the Marriage and Divorce Bill. This neccssitates the discussion of the Special Marriage Bill which was passed as the Special Marriage Act of 1954, within this chapter. The object of this Bill was to provide a special form of marriage in certain cases and for the registration of such and certain

1. Dr. B. K. Mukherjee, Mulla's Hindu Law, 11th Edition, pp. VI, VII.

other marriages. After the necessary discussion, the Bill was circulated for eliciting public opinion. The opinions, thus received, when analysed by the Law Minister, indicated that "the Government of Madras, Bombay, West Bengal, Orissa, Punjab, Hyderabad, Madhya Bharat, Travancore Cochin, Vindhya Pradesh and the Chief Commissioners of Ajmer, Coorg and Tripura were in favour of the Bill; the Government of Bihar was against it ; the Government of of Assam, Madhya Pradesh, Mysore, Pepsu, Rajasthan, Saurashtra, Himachal Pradesh, Andaman Nicobar Islands, Bilaspur, Bhopal, Delhi, Kutch, Manipur had expressed no opinion ; the Chief Justice and one judge of the Assam High Court, two judges of the Pepsu High Court, judges of the Nagpur High Court, the Chief Justice and some judges of the Punjab High Court, the Chief Justice and three judges of the Orissa High Court, two judges of the Allahabad High Court and the Judicial Commissioners of Bhopal and Kutch were in favour of the Bill ; the High Court of Calcutta also had expressed itself in favour of the Bill ; but one judge of the Assam High Court and three judges of the Madras High Court had expressed opinions against it ; the Judical Commissioners of Ajmer and judges of the High Court of Bombay, Hyderabad, Saurastra and Travancore Cochin had expressed no opinion ; Muslim opinion was definitely against it." The representatives of the Christian community had suggested that the provisions of the Divorce Act should be substantially altered. The Law Minister further stated that the public was generally in favour of the Bill which was circulated for eliciting public opinion for five months last year. On 16th of September last, the Council of States adopted the Law Minister's motion for reference of the Special Marriages Bill to a Select Committee of both Houses of Parliament to report within two months of the constitution of the Committee. Before examining the provisions of the Bills and the Acts, some discussions might profitably be made regarding the nature and history of the institution of marriage with special reference to Hindu Legal History.

3. Nature and history of the institution of marriage

Marriage is a very complex institution and it cannot be explained by one or the other ruling idea ; it represents a synthesis of several and as such it cannot give rise to one perfectly logical set of rules.[1a] According to Miraglia[2] marriage is an ethical, religious and legal institution and marriage-laws have been the subject of a long and bitter struggle between the Church and the state. The former considered the sacrament as the essence of a conjugal union. But the state by various legislations treated

1a. Vinogradoff, Historical Jurisprudence, Vol. I, pp. 163-64.

2. Comparative Legal Philosophy, section 453.

marriage as any other contract and prescribed a civil form, obligatory upon all citizens. The same philosopher[3] has characterised the institution of marriage thus:

"Matrimony is the union not of things but of human beings; it is full and perfect natural union of two individuals of different sex. From this it follows that the two sentiments of the husband and the wife should on every score be so responsive as to find the complement of each in the other. The spiritual element should respond to the spiritual, the physical to the physical, so that the man and the woman are bound together by a three-strand rope of soul, body and mind...There is true union of man and woman, only when the spiritual and mental bonds precede the physical which is only the complement or completion of the former." Hence it is not sufficient to describe marriage as an institution, originating in the animal instinct of mating and "the marriage-laws as the sum-total of the rules restricting intercourse between man and woman."[4] Kant also characterised marriage as the lease of the sexual organs. This characterisation was very much regretted by Josef Kohler who rightly regarded this observation of Kant as a standing slur on the entire German philosophy. Miraglia[5] also observes that Hegel is right when he says that Kant presents matrimony in its shamelessness, in his definition of it as a bond of the persons of different sex for the interchange and constant possession of mere sexual pleasures. Aristotle on the other hand describes matrimony as the union—exclusive, lasting and divine which results from the interpenetration of the two opposite characters of man and woman. Such a conception was common to the Roman Juris Consults also. In some systems, such as, in Hindu law, marriage was until recently, regarded as a sacrament and "an indissoluble union of flesh with flesh and bone with bone."[6] And in most of the other systems, marriage is regarded as a species of civil or secular contract. Mahomedan law also recognises temporary marriage which is known as Muta marriage. Similar instances are to be found elsewhere also.[7] Thus Hassaniyeh Arabs have a form of matrimony which lasts three days only; on the fourth day, the woman is absolutely free. In Ceylon also, there are instances of "trial-marriages"

3. *Ibid*, sections 444-46.

4. Sen Gupta, Evolution of Law, p. 49.

5. Comparative Legal Philosophy, sec. 444.

6. Pāraskara Grihyasūtra, I, 1, 5-10 ;, Tikait Monmohini V Basant Kumar, 28, Cal. 751. Now divorce and dissolution are possible under the Hindu Marriage Act (XXV) of 1955.

7. Miraglia, Comparative Legal Philosophy, section 429.

which last only for five days; after this period the marriage can be confirmed or cancelled.

Josef Kohler defines marriage as an institution, the purpose of which is to serve propagation and all the psychic impulses that surround it. This definition also cannot be regarded as a strictly logical one, as it does not take into consideration the social and economic aspects of the institution of marriage. These aspects have been more fully included in the definition of marriage as given by Prof. Vinogradoff[8]:

"It is not only an institution regulating sexual intercourse and kept up by conjugal affection, but also an arrangement for the bringing up of children and a partnership for economic ends and social co-operation. Sometimes one side and sometimes another predominates."

Vico is essentially right when he says that before the modest and religious human marriages, that is, before matrimony and family, of certain fathers with certain mothers and certain children, there was a shameless communion of things and women in which impious, shameless and wicked men lived their lives. Relics of these irregular unions and the conception of imperfect matrimony can still be found all over the world. Thus among the Santals during the *Sohrai*, the principal harvest festival, "a general saturnalia of drunkenness and debauchery prevails; chastity is in abeyance for the time and all un-married persons may indulge in promiscuous intercourse. This license, however, does not extend to adultery, nor does it cover intercourse between persons of the same class though even that offence committed during the harvest festival is punished less severely than at other times."[9] Similarly in the Naga village, or town, "where the institution of these communal houses (*pahs*, as they are called) exists for the un-married youth, the most complete license is reported to prevail between the sexes upto the time of marriage and this license is not only connived at, it is recognised by public opinion. No value is placed on youthful chastity; sexual morality in our sense of the word only begins with marriage; but after marriage infidelity is said to be very rare."[10] Besides exchange of mates also was to be found in many places.[11] Again[12] "in old Arabia, the husband was so indifferent to his

8. Historical Jurisprudence, Vol. I, p. 164.

9. Sir H. H. Risley, Tribes and Castes of Bengal, II, p. 233; Cf. Durkheim, The Elementary Form of Religious Life, translated by W. Swain, pp. 215 *et seq.*

10. Frazer, Totemism, IV, p. 300.

11. Miss Czaplicka, Aboriginal Siberia, (1914) p. 293.

12. Robertson Smith, Kinship and Marriage in Early Arabia, (1885), pp. 116-17.

wife's fidelity, that he might send her to cohabit with another man to get himself a goodly seed ; or might lend her to a guest as the Asir did up to the time of Wahhabites and as people of Dhahaban must once have done according to Ibn Al-Moghawir's account ; or going on a journey might find a friend to supply his place as the Yam did in the time of Burckhardt ; or might enter into partnership of conjugal rights with another man in return for his service as a shepherd, as we read in the Fotuh-al-Sham, p. 238, *sq*." "The old customs show this which are found in strange and scandalous cults celebrated in homage of the God, protector of fecundity. The Lydians, Sardinians and Babylonians made a sacrifice of their chastity before the wedding (as Herodotus and Strabo report), and in crises all the women of war were forced to offer their shame as an expiation to placate the divinity outraged by their violation of the marriage law of nature. The magistrate of Locros demanded in a day of public danger, the sacrifice of the chastity of the women in the Temple of Venus. Strabo himself says that the daughters of good family who devoted themselves for a certain term to the cult of Anaitis were most sought after as wives ; that such expiation was necessary in Armenia and in some parts of the Island of Cyprus. Herodotus speaks of the same custom among the Thracians. And Diodorus Siculus states that in the Balearic Island, at Majorca and Minorca and in other places, the bride for the first time belongs to all the guests .... Strabo says on this subject that a Parthian who has had two or three children by one woman can leave her and marry another. Today the Eskimos and the Indians of North and South America, the tribes of Polynesia and Australia, the Negroes of East and West Africa, like the Caffirs, give their guest temporarily some of their wives. Some Brazilian tribes do the same for their prisoners of war whom they can kill and eat. Among the ancient Peruvians, in Ethiopia and even now among many aboriginal tribes of India, Burma, Kashmir, Southern Madagascar and New Zealand, the bride belongs for the first night to all the relatives and friends. In ancient Abyssinia, among some classes in Brazil and Peru, this "*jus primae noctis*" is exercised by the Chieftain and priests. In primitive nations of Greece which were in closer relations with Asia, Corinth, for example, there was a special body of priestesses with the object of forcing their fellow women to the sacrifice of their shame. Courtesans are treated with respect in some societies, because they continue an old custom sanctioned by religion. The constant discussion of poetry, philosophy and politics developed the ideas and tastes of the Athenian courtesans. Their houses became the places of profitable leisure. Who does not know that Socrates argued with them and that Pericles was often in the house of

Aspasia ? In Abyssynia and Java, they enjoy a good name and are treated with respect. All these facts disprove Spencer's claim that the primitive community of women contained no legal[13] idea." Marriage was "recognised as an infraction of natural and religious law, because the fecundity of women like that of the earth or the great Mother should not suffer limitations."[14]

Again different peculiar customs prevail all over the world regarding the leviratical marriages and the widow re-marriages.[15] Among the North American Indians, brother's or sister's sons receive the widow in marriage and are bound to take charge of her children. Among the South American Indians, the nearest relative of the deceased has the right to marry the widow who also has an option in this matter of re-marriage. Among the Aztec and the Toltec nations the widow is married by the husband's brother for the upbringing of the children, if any. In Australia, the brother of the deceased inherits his wife and children. In Ploynesia, the brother of the deceased is regarded as the husband of the widow and the father of the children. Among the Beduins, the brother may offer to marry his brother's widow but cannot compel her to marry him. Among the Hebrews, the widow marries her husband's brother. So far as the Negro and the Congo peoples are concerned, the nephews marry their aunts. They can even marry the widows of their father except their mother. With the Bechuana, a son succeeds to the wives of his father and comes by the wife of his deceased brother. Among the Afgans, the brother is bound to marry the widow of the deceased brother.[16] Thus Vinogardoff is not wrong when he says that marital union is a highly malleable institution.[17]

Regarding the origin of the institution of human marriage there are mainly two theories militating against each other. According to one of these theories, advocated by Bachofen,[18] Mclennan,[19] Morgan,[20] Kohler,[21] Fraser,[22] Lubbock,[23] Giraud-Teulon,[24] Spencer[25] and Vico, the present form

13 Miraglia, Comparative Legal Philosophy, section 428.
14. *Ibid.*
15. A. H. Post, Ethnological Jurisprudence.
16. Cf. Leviratical marriage and widow remarriage in Hindu law.
17. Vinogradoff, Historical Jurisprudence, Vol. I, p. 164.
18. Antiquarische Briefe.
19. Origin of Consanguinity and Primitive Conditions of Matrimony.
20. System of Consanguinity and Affinity.
21. Philosophy of Law.
22. Totemism.
23. Origin of Civilisation and the Primitive Condition of Men.
24. Les Origines du Marriage et de Famille.
25. Principles of Sociology

of European monogamous marriage sprang out originally from promiscuity which gave way to group marriage, "Then comes a stage when families centered round the mothers, who gathered their children about them but maintained only loose unions with the fathers of these children. Then the patriarchal system with the predominance of the male as chief of the household made its appearance and paved the way of the monogamic marriage to which we are accustomed now-a-days."[26]

Sharply contrasted with this account of the origin of marrige, there is another account according to the other theory, propounded by Darwin,[27] Westermark,[28] Atkinson[29] and Lang.[30] This theory "starts from the position that primitive man as well as the higher apes was patriarchal through sexual jealousy and the instinct of appropriation. We have thus to start not from a state of sexnal promiscuity but from individual pairing ; the male might acquire several wives when he had a chance, but he jealously guarded his mates against possible competitors. The "cyclopaean society", as Mr Lang terms it, was built up on the despotic[31] sway of the sire over his wives and children which involved the emigration of the younger males who thereby became exogamous, that is, had to seek for mates outside their home. It is only by slow stages that these patriarchal methods gave way before more complex arrangements."[32] Examples of community of women can be found even now in many societies. "Bachofen, Mclennan, Morgan, Lubbock, Girard-Teulon agree with Lucretius and Vico in recognising primitive period of communion and invoke the authorities of ancient and modern writers. In China, women were common until the end of the reign of Fouhi and in Greece until the days of Cecrops; the Massagetis, Nasimonisons and Auseans did not know of matrimony according to Herodotus and Strabo. Strabo and Solon say that the Garamantians were in the same conditions and Zenophon adds to this class the Mosynocians who scandalised the soldiers of Cyrus by their lack of any sense of shame. The authors cited adduce many facts to prove that the most absolute communion exists in some parts of New Zealand, South America and the Andaman and Nicobar Islands. The system is found too among some Negro people who have no family names and distinguish individuals only by some peculiarity as long

26. Historical Jurisprudence, Vol. II, p. 165.
27. Descent of Man, 2nd Edition, Vol. II, p. 395.
28. History of Human Marriage, 2nd Edition, 1894.
29. Primal Law, 1903.
30. Social Origin.
31. Cf. The Veddas (1911), C. G. and B. Z. Seligman.
32. Vinogradoff, Historical Jurisprudence, Vol. I, p. 165.]

or lame."[33] The group marriages are found to exist in central Australia.[34] And an account of the Cyclopaean family has been given by N. W. Thomas.[35]

In passing, we may, not inappropriately, refer to the views of Crawley[36] according to whom primitive people far from being promiscuous were actually afraid of sexual intercourse which they tried to avoid by all means, thus giving rise to several rules and restrictions for the purpose excluding intercourse. But this theory of sex-antagonism can be hardly supported.[37]

Vinogradoff[38] is undoubtedly right when he observes that it is very improbable that one rigid course was followed by mankind in the historical development of marriage law. The same view has been shared and elaborated by other jurists[39] also. Though as a matter of fact, we do not know what the original form of marital union was and though we are not in a position to hold that the selfsame course was followed everywhere, regarding the evolution of human marriage, yet we cannot controvert certain essential and fundamental ideas which assert themselves more or less in all forms of human marriages. There are four such fundamental ideas, as enumerated by Professor Vinogradoff.[40]

4. Hindu marriage

The most conspicuous feature of Hindu law is that in this system, in theory at least, sonship was not necessarily connected with marriage and marriage was not necessarily connected with love and consummation. In Hindu law, marriage was a sacrament (Saṃskāra), a union—an idissoluble union of flesh with flesh, bone with bone—to be continued even in the next world.[41] A Hindu marriage was a sacrament in the sense that a man was not deemed as completely born until he took a wife. Besides the partnership with the wife was indispensable for the husband in gaining religious merit by performing sacrifices etc. This idea of indissoluble union between the

33. Miraglia, Comparative Legal Philosophy, section 426.
34. Spencer and Gillen, The Northern Tribes of Central Australia, pp. 72 *et seq.*
35. Kinship Organisation and Group Marriage in Australia. (1906) p. 64.
36. The Mystic Rose, pp. 222 *et seq*
37. Sen Gupta, Evolutitn of Law, p. 52.
38. Historical Jurisprudence, Vol. I, p. 164.
39. Sen Gupta, Evolution of Law, pp. 54 *et seq.*
40. Historical Jurisprudence, Vol. I, pp. 167-68.
41. Tikait Manomohini V Basant Kumar, 28 Cal. 758. For drastic changes, see the Hindu Marriage Act (XXV) of 1955.

husband and the wife was thus expressed by the Pāraskaragrihyasūtra :[42] "Prāṇaiste prāṇān sandadhāmi, asthibhirasthīni māṃsairmāṃsāni tvacā tvacamiti." It had also led to the fiction of the identity of the husband and the wife. Thus Manu[43] says, "Viprāḥprāhustathācaitad yo bhartā sā smritāṃganā." That is, the Brahmins declare that he that is known as the husband is known as the wife. Commenting on this text of Manu, Kullukabhaṭṭa[44] quotes the following passage from the Vājasaneya Brāhmaṇa:

"Ardho ha vā eṣa ātmanaḥ tasmād yajjāyām na vindati naitāvat prajāyate asarvo hi tāvadbhavati atha yathaiva jāyām vindati atha prajāyate tarhi sarvobhavati. Tathācaitad vedavido viprā vadanti "Yo bhartāsaiva bhāryyā smritā." That is, a man is only half of his self. Therefore, he is not fully born, until he takes a wife, for so long he remains incomplete. A man is fully born only when he takes a wife and then alone he becomes complete. Therefore, the Brahmins, versed in the Vedas, declare this : "The person known as the husband is verily known as the wife."

The identity of the husband and the wife was more clearly expressed in a text of Brihaspati[45] who upon the hypothesis of the fictitious identity of the husband and the wife declares a widow to be entitled to succeed to the estate of a sonless husband in preference to all other heirs :

"Āmnāye Smritiśāstre ca lokācāre ca suribhiḥ
Śarīrārdhaṃ smritā bhāryyā punyāpunyaphalesamā
Yasya noparatā bhāryyā dehārdhaṃ tasya jīvati,
Jīvatyardhaśarīreartham kathamanyaḥ samāpunayāt
Sakulyairvidyamānaistu pitribhrātrisanāthibhiḥ
Asutasya pramītasya patnī tadbhāgahāriṇī."

That is, in the sacred text, the Smriti code, the popular usage, a wife is recognised as half the body and an equal participator in good and bad fruits. Of him whose wife does not cease to live, half the body continues to live. While half the body lives, how can anybody else take the wealth of the deceased ? Even when agnates including the father, brother and cousins of a sonless deceased man are living, the widow takes the property.

It is really very difficult, if not impossible, to reconcile the anomaly resulting from the enumeration of the different forms of marriage and the different kinds of secondary sons, as they have been described in the

42. I. 1. 5-10.
43. Manu, IX, 45.
44. *Ibid*, Commentary.
45. Smriticandrikā, Mysore Government Oriental Library Series, No. 48, p. 673.

Dharmasūtras and the Dharmaśāstras by the different sages of ancient India. The different kinds of secondary sons were not perhaps really in regular existence in the ancient Hindu society; but they were only an exhaustive enumeration by the sage-legislators. Various reasons might be suggested in explaining this position.[46] As regards the various forms of marriage also the same arguments apply with equal emphasis; but in case of marriage, the enumeration of the different forms is by no means exhaustive. For besides the eight forms of marriage, usually described by the sages, there might be conceived and actually there were in existence, according to numerous literary references, some other forms of marriage which have not been enumerated by the authors of the Smritis. The marriage of a courtesan by a husbandman, the re-marriage of widows[47] and the Svayaṃvara marriages may be cited as instances in point.

5. Marriage with courtesans and Svayaṃvara

The institution of concubinage was found in India even from the earliest period. Similar institutions also were found to have existed in ancient Rome. But in accordance with Roman law, a man already having a legitimate wife could not be allowed to live with a courtesan. But this restriction was unknown to Hindu law. We shall discuss this form of marriage with reference to the incidents that have been described in the Sanskrit drama Mṛicchakaṭikam which is ascribed to Śūdraka. Though the date and the authorship of this work are not known for certain, nevertheless, it is admitted by all that it must be of considerable antiquity.

From this drama[48] we learn that Cārudatta, a Brahmin merchant, already having a legitimate wife, Dhūtā by name, married Vasantasenā who was a courtesan. This marriage of a Brahmin with a courtesan offers

46. Vide ante, chapter III and Dr. U. C. Sarkar's "On Marriage and Sonship in Hindu Law," pp. 51 *et seq.*

47. Vide ante, chapter XIV, Hindu Widow Re-marriage Act of 1856.

48. The most important question in this connection, however, is as to when such marriages prevailed in the society, if at all. In fact, there is no sure indication as to the society of which period has been depicted in the drama Mṛicchakaṭikam. It may be that the society, as depicted in the Mṛicchakaṭikam was a real one existing at the time of the author; or it is also possible to think that the author might have described the state of the society which was in vogue before his time, for the description of a past state of things is also frequently come across in literature or it may be that the state of the society was neither a past one nor a really existing one but the state of the society might be the product of the author's imagination—a suggestion which is most plausible from the very definition of a Prakaraṇa in which the plot is to be imaginary—kavikalpitam. The Mṛicchakaṭikam is a Prakaraṇa.

a new type of marriage altogether. Besides this marriage with a courtesan, there is another similar marriage. In this case also, the man marrying the courtesan is a Brahmin, named Śarvilaka, who is represented as a thief in the drama. Śarvilaka marries Madanikā who is a courtesan and also an attending maid of Vasantasenā. Vasantasenā is a courtesan and a daughter of a courtesan. She fell in love with Cārudatta, a Brahmin merchant and finally with the kingship of Āryaka, she was given as a legal wife to Cārudatta. It may appear that such a union is quite against the spirit of modern society at least, but this might be a custom of the period which had been described in the play. Thus Śarvilaka takes the hand of Madanikā without the least social consideration. Had there been any bar to take a courtesan for a legitimate wife, Śarvilaka must have hesitated, before taking Madanikā for his wife. And Madanika also after her union with Śarvilaka requests him to take her to his parents, when he was leaving her to help his friend Āryyaka. Vasantasenā was made the legal wife of Cārudatta by the royal prerogative of Āryyaka; and furthermore, the profession of a courtesan was not even then a noble one. Thus Vasantasenā condemns herself when she was asked by Cārudatta, through mistake, to take Rohasena, Cārudatta's son to the interior of the house, as Vasantasenā was quite aware of the fact that a courtesan as she was, she could not enter there. To get rid of the stigma of a courtesan, Vasantasenā's envy was quite manifest at the time when Madanikā was taken as a wife by Śarvilaka. It cannot also be held that the profession of a courtesan was then encouraged in any way. Nor were the position and character of the prostitutes of that period in any way superior. Vita on one occasion very beautifully summarises the charateristics of the then courtesans. These characteristics have not suffered any change in any way even to-day. That the position of a courtesan and any association with her were censured is obvious from the trial scene in the Mṛicchakaṭikam, when Cārudatta hesitates again and again to express openly that he had got any connection with a courtesan. Vasantasenā's mother was a typical courtesan, but the daughter was quite different from the mother. Yet we cannot help admiring Vasantasenā's mother, when we see that she importuned the court again and again to release Cārudatta, even though he might have murdered Vasantasenā.

The union of Śarvilaka with Madanikā tends to show that the courtesans might be freely taken into the society as legitimate wives, for we might expect to hear at least some discourse from the mouth of Śarvilaka who appears to be quite a learned and considerate man, as he shows himself to be, when he says that though a thief, he does not steal the property of a Brahmin, nor does he do any harm to any woman, child and so forth.

But the union[49] of Cārudatta and Vasantasenā[50] rests on a different footing.

Svayaṃvara is an institution which seems to have been widely prevalent in ancient India. This institution seems to be as old as if not older than the Ṛigveda. The two Aśvins were supposed to be taken as husbands by Ūṣas in the Svayaṃvara form. In a Rigvedic verse[51] we find that the admirable horses of the Aśvins bore the car to the goal for the sake of honour and Ūṣas who was the prize came to them through affection and accepted them as her husbands; saying that they were her lords to the exclusion of Soma. From this ṛic, it appears that Ūṣas had the liberty of choosing her husbands from among a number of suitors. In the Rāmāyaṇa and the Mahābhārata, there are very many illustrations of the Svayaṃvara[52] form of marriage. We have illustration of the Svayaṃvara form of marriage even in the comparatively recent times—during the reigns of Jayacandra and Pṛithvīrāj.

6. Some observations on the Hindu Code Bill

As it has already been noticed, the Hindu Code Bill or rather the spirit responsible for its genesis had been subject to severe criticism from many responsible persons and institutions in India ; though at the same time, there were again many supporters of the proposed measure. Reference may be made to some of the criticisms of the Bill.

49. Here Āryyaka out of gratitude for Cārudatta might have allowed him the privilege of taking Vasantasenā as his wife. Āryyaka, as king, might very well dispense with the social consideration of a thing which he was going to do himself for one of his most benevolent friends. Far from encouraging, these steps might go to discourage, to a very great extent, the ignoble profession of a concubine.

50. In showing the antiquity of the play, Wilson assumes Vasantasenā to be a S'ūdra woman. But this assumption is quite unwarrantable. Vasantasenā's caste is difficult to ascertain. Her mother seems to be a courtesan following her usual profession. Such courtesans are generally prompted by passion to take recourse to such a contemptuous mode of living, as it appears from the words of the judge in the 9th Act. It is quite natural that a courtesan might originally have any caste—high or low. But it has been the usual practice to call such unholy creatures by a class name, such as, courtesans thus the original caste tending to be merged in that class name.

51. Rigveda, X. 85. 9.

52. Thus even the Gods like Indra, Varuṇa, Yama and others vied with one another to win the love of the Damayantī. But Damayantī ultimately made her choice. The beautiful king Nala was selected as the groom to the exclusion of the Gods even. Besides this illustration in the Mahābhārata, there are many instances of Svayaṃvara in the Rāmāyaṇa also where the princesses could choose their husbands from among several princes, assembled for winning their hands.

In the first place, it is neither feasible nor desirable to have one single Code for all Hindus living in the sub-continent. It was rightly remarked by Mayne[53] that "the age of miracles has passed and I hardly expect to see a Code of Hindu Law which shall satisfy the trader and the agriculturist, the Punjabi and the Bengali, the Pandit of Benaras and the Rameswaram of Amritsar and Poona. But I can easily imagine a very beautiful and spacious Code which should produce much more dissatisfaction and expense than the law at present administered."[54] There is said to be one Hindu law and one Hindu religion but that is only theoretical. In actual practice there are so many elements of difference and divergence in the forms of customs and usages and schools and sects. This has been most clearly described by Dr. Suniti Kumar Chatterjee thus: "I am completely opposed to the idea of a code of Hindu Law applicable to all Hindus throughout the country which evidently is the intention of the Hindu Law Committee. Such a code in my opinion goes counter to the history of the evolution of Hindu society and Hindu religion.........I think a similar point of view also dominated the evolution of law in England. The English genius has never been very friendly to codification; their social law and even their constitution—these are based on convention, on usage and on precedents and yet the English seem to be getting on all right. I fail to understand this haste in getting up a single Hindu Code, when Hinduism presents much diversity inspite of its underlying unity. Life is a growth and a movement and a Code is a static thing; Hindu Law in all its divergencies reflects life and a rigid Code intending to be all inclusive will hamper its growth."

In the second place, there is no demand for the codification of Hindu law by the Hindu public. This is so, as most of the rules of Hindu law are now well-established and easily understandable. Had there been any necessity, it would have been expressed through public opinion. So any codification is sure to be not only unwarranted but also undesirable. The undesirability of the Hindu Code had been most unequivocally evinced by the criticism it had evoked. The Committee also did not intend to foist anything against the desire of the society which would militate against the

53. Hindu Law and Usage, Ist Edition, Preface. This passage has been quoted in the report of the Rau Committee also, at p. 12.

54. Sir D. F. Mulla also contended in the 6th Edition of his Hindu Law that there was some necessity for codifying Hindu Law where there was conflict of authorities. This implied only piece-meal legislation and not the codification of the whole of Hindu Law. This position was omitted from the subsequent editions. The view of Mulla also has been cited by the Rau Committee.

time-honoured ideas and institutions of the Hindus. Thus the Committee noted, "Nor can we believe that a thoughtful reformer will wish to lay violent hands on the ancient structure of Hindu Law except for proved necessity. It is a spacious structure with many schools and by a judicious selection and combination of the best elements in each, he should be able to evolve a system which while retaining the distinctive character of Hindu Law will satisfy the needs of any progressive society."

In the third place, one of the objects of the Rau Committee was to evolve a uniform Code of Hindu law "blending the most progressive elements in the various schools of law which prevail in different parts of the country." But this would be hardly feasible in actual practice. The different schools of Hindu law are so clearly established and the customs and usages of the various places are so radically different from one another that one uniform Code is sure to revolutionise the whole social structure and give rise to chaos and confusion resulting from the dislocation of the traditional and time-honoured conceptions and practices. Inspite of the local variations, the rules of Hindu law are so well-settled that no Hindu, governed by the Dāyabhāga school, is feeling any necessity of being governed by the Mitākṣarā school and *vice versa*; none of them again is feeling any striking incongruity in the provisions made by their respective schools. "But after all, is uniformity," ask some eminent jurists and judges,[55] "such a desideratum that it must be purchased at any price ? Diversities of usage are inevitable among the very large number of Hindus who inhabit this vast sub-continent and it was for nothing that the Hindu law-givers recognised the paramount authority of local usages and customs. Why then, it may be asked, must the Hindus of any particular locality be necessarily called upon to forswear their own distinctive traits and traditions in the interests of a theoretical symmetry? And why further for the sake of attaining and ideal uniformity must the law be cut off from its ancient moorings ? Hindu law, divorced from the Smritis and the Nibandhas, would be a contradiction in terms. We are definitely of opinion that any attempt to break down the various schools of law and merge them all into one uniform system is a move in the wrong direction. But this is not saying that there may not be elements in any existing school of law that do not call for a change. Nor would it

55. This refers to the written statement, submitted before the Hindu Law Committee (Rau Committee) by the Hon'ble Mr. Justice R. C. Mitter, the Hon'ble Dr. B. K. Mukherjee, late Chief Justice of the Supreme Court of India, the Hon'ble Mr. C. C. Biswas, sometime the Law Minister of India and the Hon'ble Mr. A. N. Sen, Judge, Calcutta High Court.

be right to decry any proposal to introduce such specific changes by legislative action as "piece-meal legislation," and to insist on comprehensive legislation as the only alternative. We think that there is a certain amount of unfounded prejudice against what is usually called "piece-meal legislation." Unlike other countries in Europe, legislation in England has always been piece-meal and has had no un-toward results. It is piece-meal compared with the totality of the laws, but may be quite exhaustive so far as that particular topic or branch of law is concerned. In such partial legislation, however, care must be taken to see that it is not a misfit with the rest of the law, as was undoubtedly the case with Act XVIII of 1937 (Hindu Women's Rights to Property Act). Is codification apparently on a large scale at all necessary, desirable or conducive to the well-being of any society in general and to the Hindu society in particular? Amendments and legislation, though piece-meal, may be effected with the express or implied consent and approval of the people themselves. This has been actually done so far by direct legislation, as well as indirect legislation, namely, adjudication. This is the natural process. Anything contrary to it is sure to evoke criticism and protest undermining the very strength of the actions contemplated."

Rights of women had been sought to be expanded. But how would these contemplated efforts actually benefit the Hindu society at large in the collective sense? Thus it may apparently be supposed that if a girl is allowed to inherit her father's property, she will be adding to the estate of her husband, after the marriage, when that property will be taken to her husband's family. But it is not possible to ignore this very glaring fact that as the wife will be taking some property from her father's family, so if there is any sister of the husband, she also will be similarly taking out her share of her father's property to her husband's family. What then is the net gain or position? These additions and subtractions are ultimately meaningless, as neither of the families is actually gaining anything substantially. Ultimately, more or less *status quo* will be the net result. If the husband's patrimony is not diminished in any way by his sister's inheritance, it does not matter much whether the wife will be bringing any property with her from her father's family or not. If the husband's property remains un-affected, this will virtually mean that the wife also will be benefited by the property of her husband. Hence the contemplated preferential treatment to the daughters would not actually improve their lots, as claimed. This is a simple question of Arithmatic.

Another striking consequence of the contemplated preferential treatment to the daughters would be that sufficient expenses will not be

incurred for their education and training upto the time of marriage. Even without any legislation, at the present time also, parents and brothers try their best for suitable grooms even at the highest costs possible. This is sheerly on account of the sentiment of love and affection. But once legislation is there, no one will be keen enough for their training and education. This will also put an end to all sorts of individual enterprises on the parts of the daughters. Thus the proposed legislation was sure to do more harm than good. Moreover, married daughters morally are not and legally shall not be liable to maintain and support the parents even in difficulties and distresses. Cases of sons are quite different.

There are some such questions, such as, the supposed equality of the sexes or divorce which are almost eternal and which can never be answered by simple 'yes' or 'no.' They have ever baffled human solution and they are likely to do so for all times to come. It is never the contention of any party that monogamy and divorce are the ideal institutions which must be accepted and followed by everybody. There are unhappy families and unions under all systems of marriage and they are bound to remain more or less the same, so long as human nature will remain what it is. The evils from the remedy must not out-number or exceed the evils that are sought to be remedied.

Again survivorship which is a necessary corollary of the Hindu joint family in the Mitākṣarā school has been adhered to by that school from a very very long time. It has undoubtedly certain advantages and disadvantages of its own, when contrasted with the Dāyabhāga school. The spirit of the code seems to be against everything Hindu.

The attempt of the Code seems to change the culture and civilisations of the Hindus by legislation which is an absurdity in itself. The Code contemplates secularisation of everything which has been inextricably connected with Hindu religion and culture. Marriage was a sacrament and not a civil or secular contract. Inheritance was largely based on the theory of Shradh or Piṇḍa. Though these theories had been adhered to by the Hindus from time immemorial, occasional changes and deviations had been advocated even by the sage-legislators themselves, according to the exigency of the situation. Widow re-marriage and dissolution of marriage in certain cases were to be found in the original texts themselves. These are certainly to be understood as exceptions rather than as general rules. As a matter of fact, without religion, philosophy and culture what is Hinduism and what is the contribution thereof ? The piece of contemplated legislation was sure to lead to more chaos and confusion and lack of social discipline and order.

The advocates of the Code were in a sense the peculiar products of Western civilisation and Western education. They did not understand the underlying spirit or genius of the Hindu culture and religion. Nor did they understand how to accept and assimilate what is best in a foreign culture and civilisation. They were always attracted more by the exterior rather than by the intrinsic worth. It may be said without fear of contradiction or exaggeration that those who were really benefited by Western contact were never unwise enough to denounce their own cultural achievements and contributions. The late Iśwar Candra Vidyāsāgar wanted social reforms, but he did not want so sacrifice or abandon everything of the Śāstras. He clearly wanted the reforms within the very pricincts of the original texts—whose authority or utility was never questioned. Similar was the case with the religious reformers like Rājā Rām Mohan Roy, Rāma Krisṇa and Vivekānanda. They never departed from Hinduism; they only emphasised certain aspects which were not otherwise magnified in ordinary circumstances.

As a strong government is a political necessity for the state, so also a strict body of social rules and restrictions is a desideratum for the control and all-round progress of the society. It is nobody's case that no change whatsoever should be introduced in the system of Hindu law. Law must reflect the social needs and must try to meet them. As society is not stable, so law also can never be stagnant. The changes in the one will necessarily lead to the changes in the other. Revolutionary changes are never necessary nor desirable. Let there be legislation, as there is need felt for it in the society at large. The microscopic minority in the society has no right to impose its misguided opinion on the rest of the society, unless it is also convinced of the wisdom and expediency of the innovations that are sought to be introduced. The most balanced and the best considered opinions on the Hindu Code Bill had been given by four judges of the Calcutta High Court including the sometime Law Minister Shri C. C. Biswas and Dr. B. K. Mukherjee, the late Chief Justice of the Supreme Court of India. These eminent judges and jurists did not also fail to notice the real improvements, suggested by the Code in some matters of inheritance, when they held that "in the rules regarding inheritance the Committee have brought in many blood-relations who are now excluded from the list of heirs either because they belong to the female sex or because they do not come within the scope of the Piṇḍa theory. We also find that the Committee have in an admirable way framed rules for precedence among non-enumerated heirs (Part II, Rules 8-9). These matters were not dealt with by the commentators and might in our opinion fittingly form the subject of partial or auxiliary legislation

like Act II of 1929 which set a useful precedent for such legislation by removing certain defects in the Mitākṣarā law of inheritance...........The chapter on maintenance also had been admirably worked out and removes certain long-felt grievances."

The other two points that had been rightly commented upon were the inclusion of daughters in the list of simultaneous heirs under Class I and the question of marriage. The first according to them was considered to be a "change of revolutionary character which of all the proposals in the Code has perhaps evoked the strongest and the most widely expressed protest. The framers of the Code themselves do not appear to have been so very sure as to how far their proposal would re-act on the Hindu mind; and this perhaps dictated a cautious move on their part, in providing for the daughter only a half of the share of a son, as under the Muslim law..."

While on the topic of marriage, they had been "constrained to observe that the Committee's approach to the subject has not been correct. The first thing that the legislature should do in dealing with marriage is to lay down the essential conditions of valid marriage, viz., physical and mental capacity, age restrictions, prohibited relationship and so forth. The question of form which is also essential then comes in. And most systems of modern law prescribed a form for civil marriage as an alternative to religious marriage. In a civil marriage, however, the essentials remain the same except that no religious ceremony need be gone through. It is against elementary rules of civilised jurisprudence to lay down that there should be one kind of prohibited degrees in sacramental marriage and a different kind in case of civil marriage. But that is what the Code seeks to do, for Hindu civil marriage should in that case cease to be a part of Hindu law and must remain a separate branch of the law altogether. We notice with some surprise that the framers of the Code have gone much beyond the rules of the Special Marriage Act and have permitted marriages even between first cousins which is entirely obnoxious to Hindu sentiments. Whether civil marriage is made a part of Hindu law or is left to be regulated by the Special Marriage Act, we are definitely of opinion that essentials of a Hindu marriage except in matter of ceremonies should be the same in either from. In our opinion, the best thing would be to keep the civil marriage out of Hindu law altogether and leave it to be regulated by the Special Marriage Act with a repeal of those provisions thereof which provide that even when Hindus marry thereunder, they would be governed by the Indian Succession Act."

7. The Special Marriage Act, (XL III) of 1954

The criticism and protest against the Hindu Code Bill had not gone in vain. The idea of comprehensive codification of Hindu law was indirectly given up. The Government had deemed it fit to split up the measure contemplated by the Hindu Code Bill into fragments.

This Special Marriage Act of 1954 is essentiallv part of the original Hindu Code Bill with special reference to the civil marriage with some minor alterations here and there. Hence all the criticisms that have been made against the Hindu Code Bill would apply more or less *mutatis mutandis* with respect to the Special Marriage Act also. As a matter of fact the provisions concerning marriage and divorce as contained in the Hindu Code Bill evoked the severest criticisn in view of the revolutionary changes contemplated by it. Necessarily the criticism in connection with the Special Marriage Act also was directed against those very propositions which were more injurious than useless.

It was claimed by the advocates of this Act that it would be only the first step towards the realisation of a uniform civil code, as contemplated by Article 44 of the Constitution of India.[56] It is clearly difficult to realise this uniformity in the sphere of personal laws in India, where the systems of personal law are most inextricably mixed up with the question of religion. Thus in Hindu law marriage was a sacrament[57] and inheritance specially in the Dāyabhāga school was based on the theory of Piṇḍa or religious efficacy. Hence the same provision for marriage cannot be contemplated for the governance of all people in India which includes followers of many other religious faith besides the Hindus. The Special Marriage Act only makes permissive provisions ; it by no means contemplates any compulsory application of the law of marriage. This Act also does not provide the only method of marriage to be followed by all the Indians alike. Thus the already existing forms of marriage will mainly continue to exist in the land ; there is also nothing in this Act which will even in remote future put an end to these marriages. This Act could be regarded as an effective measure towards uniformity, if this could exclude other forms of marriage at present or in future—near or remote. But as that is not what is contemplated, it can be easily seen that far from tending to uniformity, the Act will give rise to another special form of marriage

56. It runs as follows : "The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

57. This question has been fully discussed in the connection with the institution of Hindu marriage ; see ante, section 3 of this chapter.

besides those which are already found to be in existence. In reality, inspite of the ado and the high sounding names the present Act[58] is nothing but an amendment of the Special Marriage Act of 1872, as alrealy amended by Dr. Gour's Act of 1923. According to the provision of the Act of 1872, marriages could be celebrated between persons neither of whom professed the Christain, or Hindu, or Muhamedan or Jewish, or Buddhist, or Parsi, or Sikh or Jain religion. After the amendment of Dr. H. S. Gour, persons could marry without making the aforesaid declaration; but they had to make another sort of declaration that both of them belonged to the same faith, such as, Hindu, Sikh, Buddhist or Jain. Thus the Act of 1872 permitted a marriage between people who were neither Hindus, nor Muslims nor Christians etc. the only formality required being to get such a marriage registered according to the provisions of this Act. The later Act (Dr. Gour's Act) had added the word Hindus in the former Act so that Hindus conld marry under the provisions of this Act without legally ceasing to be Hindus.[59] According to the Act of 1954, no declaration will be necessary regarding the religion of the parties. This is the most conspicuous feature of this Act. And sometimes parties professing different religions and not inclined to change any one of them find difficulty in solemnising marriage in India. The strictly personal laws almost invariably insist on the identity of religion of the parties. Such marriages will be recognised as valid by the present Act. Such an actual case[60] was referred to by the

58. The Hindu Code Bill was for the codification of the Hindu law only, but the Special Marriage Act is not exclusively meant for the Hindus; it will apply to all Indian citizens though only in a permissive manner. From this alone one need not understand that this Act will serve to make the law uniform for all persons in India.

59. The Hindu law of joint family, succession and inheritance will not apply to them; thus while nominally remainiag Hindus, they will legally cease to be so. They will be governed by the Indian Succession Act.

60. Shri V. K. Dhage, a Hindu, was a member of the Council of States. He wanted to marry a Parsi girl named Tehmina P. Mehta. None of them was willing to discard their own religion. The Special Marriage Act of 1872, as amended by the Act of 1923 had no provision to govern and recognise such a marriage. They could, of course, enter into matrimonial alliance only by giving up their religion Thus to avoid the legal difficulties they entered into a marriage contract some of the provisions of which run as follows:

In accordance with juristic, ethical and natural principles of marriage our alliance is proper and valid and we Tehmina P. Mehta, Parsi and Venket K. Dhage, Hindu do here by contract marriage between us by mutual consent and hereby declare ourselves as man and wife and mutually agree to be bound as follows:

(1) We shall have a common aim in life and that, as far as possible, will be the service of the people, socially, politically, culturally and economically.

(2) We shall be physically and mentally faithful, honest and helpful to each other.

Law Minister, when he was introducing the Bill into the Council of States. It had been rightly said by the critics of the Bill[61] that its purposes could be served by making necessary amendments in the already existing Special Marriage Act of 1872, as modified by the Act of 1923. The pointed criticism had been made on this point by Dr. B. R. Ambedkar according to whom the Bill was a retrogade step in as much as ninety *per cent* of the provisions in the Bill had been adopted from the Act of 1872 : "In a country so little progressive as ours has been," says Dr. Ambedkar, in criticising the Bill, "it should be the duty of the Government to take time by the forelock and make changes which appear to be supported by the society. This Bill on the other hand goes back to 1872, although we live in 1953. It was a dangerous thing to deal piece-meal with the Hindu Code, but it was clear that the intention of the Government was to chisel it out, bit by bit, and see whether it could be enacted in that form. If the marriage law laid down only the principle of marriage and the law of adoption and the law of inheritance continued as in the past, I think it will result in nothing but chaos." Dr. Ambedkar also commented upon the disabilities imposed by the Bill, such as, taking away the right of adoption and severance from the joint family. The only difference between a Vedic marriage and a marriage under this Bill was the method of solemnisation. Was it so radical as to require that the law should drive out a man from his family and make complete serverance ? "In the Act of 1872", continued Dr. Ambedkar, "having regard to the sentiment of the peo-

(3) We believe that for a full life there must atleast, be one child to every alliance. We believe that by the adoption of scientific methods, children should be planned provided children are advisable to have on eugenic and hygienic principles, and, as the population problem has assumed an appalling condition and as food is not available for all, we plan not to have children at the present.

(4) We believe that it is the right of the woman to choose to have or not to have a child and the time for it.

(5) We may separate at will and particularly on the following grounds :

Physical and mental cruelty, imprisonment for a crime for two years, suffering from any loathsome and venerial disease and dishonest physical and mental behaviour......"A.I.R. 1953 (Journal Section), p. 3.

61. In cases of marriages abroad, the Act confined itself to marriages between persons both of whom were citizens of India. Complicated questions would arise in the case of marriages abroad when only one of the parties was a person domiciled in India. It might be necessary for the Government to introduce in Parliament later a Bill dealing with foregin marriage on the lines of English Foreign Marriage Act of 1892. Under that Act a marriage solemised abroad when one of the parties was a British subject was declared to be vaild as if it had been solemnised in the United Kingdom with due observance of all forms required by law.

ple then existing it was perhaps necessary for the Government to go cautiously and very slowly. But we who belong to the people, who can feel the pulse of the people how fast it is or how slow and in what direction, should-certainly show much more courage to go forward rather than take this retrogade step." It has also been said by way of criticism that the Act of 1954 is a mere word for word repetition of the Special Marriage Act of 1872 or only a modified copy of the same. Hence there was no justification of introducing a new Bill. The purpose could be easily served by making suitable amendment of the Acts of 1872 and 1923. To meet these criticisms, the Law Minister contended that he had brought forward a new Bill in order to give public opinion an opportunity to express itself on the various provisions of the Special Marriage Act of 1872. The Law Minister further claimed that public opinion was generally in favour of the Bill and that its provisions might be expected to produce a salutory effect in that it might lead to more homogeneity in society although such a process would be a long drawn out one. The Bill which did not compel any one to act against his wishes might be described as the first attempt to secure to the citizens a uniform Code.

According to the provisions of the Act of 1954, a Hindu marrying under it will be deemed to have been separated from his family and regarding inheritance and succession will be governed by the Indian Succession Act. If the Act is to be independent of religion, then it is quite logical to see that their religion is not also affected in any way. As the marriage can be celebrated without any change in the religion of the parties, it is quite rational to contend that they should not be severed from their religion and they should continue to be members of their natural families, so that inheritance and succession also might take place according to the law of the parties when they belonged to the same religion and according to the terms agreed upon by the parties, when they belonged to different religious persuations. This question is also closely connected with the religion of the children when the parents belong to different religions. According to the general rule, in absence of any other provision, the children are to follow the religion of their father. The question will not arise when the parents will belong to the same religion. But according to the provision of the Act of 1954, even in case both the parties are Hindus, they will be deemed to be severed from the Hindu family. The Law Minister himself realised the injustice or the irrationality of the provision. This was indeed a very serious departure from the prevailing Hindu law. There might be some point in this disqualification when the husband and the wife belonged to different religions, but when they belonged to the same religion, why should it affect their rights of inheritance

and succession? The Law Minister did realise that the provisions about the severance from joint family might require some modification. He had asked himself, for example, why there should be compulsory severance from joint family in the case of marriage between two Hindus under the Special Marriage Act. Again regarding the religion of the issue of a marriage solemnised under the measure, it was suggested by the Law Minister that it might not be difficult to provide that at the time of the marriage or at a subsequent date, the parties in question should declare in writing that the issue would be governed by a particular religion. In absence of any such declaration, it was presumed that the children would profess the religion of their father.

The Parsees criticised the Special Marriage Bill by saying that according to their customs, marriages between the children of two brothers or sisters were allowed and that the proposed Bill which brought such marriages within the prohibited degrees of relationship would cause them hardship.

Again the Muslims criticised the Bill by saying that it was not possible for Muslims and Hindus to marry in contravention of the religious laws under which their marriage should be performed and still call themselves Hindus or Muslims. It was, however, a different matter if they declared that a person renounced his religion and then married as he liked. It could not be possible to have a uniform civil code governing all the different religions existing in the country. The Act interfering with the personal laws will re-act very unfavourably not only upon the Muslims but also upon the Hindus and the Christians.[62] The Christians also criticised the Bill by contending that the provisions of the Indian Divorce Act were not quite satisfactory and also that they should be adequately modified.

Let us briefly refer to the conditions[63] that have been enumerated for the validity of a marriage[64] to be solemnised under the Act XLIII of 1954.

62. All the points that had been raised by way of criticism were fully examined by the Select Committee of both Houses of Parliament

63. In special marriages no reference is necessary to the religion of the intending parties to the marriage. This is an innovation or improvement that has been devised by the Act of 1954, as compared with the Acts of 1872 and 1923.

64. Sec 4(a). This condition expressly lays down that the contemplated special marriages can be only monogamous in character. So far as Hindu law before the Act of 1955 was concerned polygamy was not legally prohibited though in practice it was going out of vogue. Similarly in Mahomedan law also, though a Muslim is entitled in law to take four wives at a time, still in reality there is a decisive tendency towards monogamy specialty in the

The conditions[65] enumerated in section 4 will atonce indicate how these special marriages will differ[66] from the other forms of marriages[67] under the different systems of personal law. Another very important provision contemplated by the Act of 1954 is with respect to the registration[68] of marriages solemnised in forms other[69] than those included in the present Act.[70]

8. Divorce in Hindu law before the passing of the Hindu Marriage Act, 1955.

Divorce is a conception which seems to have been conspicuous by its

educated and progressive Muslims. There is no serious objection to make the marriages legally monogamous. The only objection was that no legislation was deemed necessary for this purpose.

65. Sec 4(b). This is also a welcome condition in the sense that the law on the point in Hindu law in particular was not quite clear. In 1942 the Madras and the Allahabad High Courts have held that the marriage of a lunatic is invalid. But in Ratan Mani Devi V Nagendra Narayan after discussing the different texts and authorities on Hindu law, the Calcutta High Court (1949 A. C. 404) has held that the marriage of a female with a male who is impotent and has not been able to consummate the marriage is a nullity. "But even considering Hindu marriage to be entirely a sacrament, as the acceptance of the bride is a necessary and indispensable part of the ceremony a person whose loss of reason is complete should be held incompetent to accept the bride and the marriage must be regarded as invalid on that ground. There are however, degrees of insanity and if the mental aberration is not of such a character as to make the bridegroom incapable of understanding the ceremonies of marriage and taking an intelligent part in them, the marriage should be held to be valid (38 Cal. 700). When a congenital idiot's marriage was arranged by his father and his wife gave birth to two sons it was held that he was lawfully married" (1942 Mad. 807). Cf. The Hindu Marriage Act of 1955.

66. The Child Marriage Restraint Act has been superseded as the age of the girls and boys is concerned. Sec. 4 (c).

67. The Parsees are entitled to celebrate marriages even between the children of brothers and sisters—on the strength of customs. The prohibited degrees have been specifically enumerated in the Act of 1954. Valid customs should be recognised as exceptions where necessary. Section 4 (d).

68. The provision for registration of marriages solemnised in other forms is somewhat novel. By this provision scope will be given to many more marriages to be placed almost on the same footing as the special marriages, though as a matter of fact, they were solemnised in different forms according to different principles. Thus other forms of marriage are not discouraged but an opportunity only has been given at least in some cases when there may be a tendency towards the equalisation and uniformity of marriages among those who will try to take advantages of the special provisions.

69. The essential conditions necessary for the registration must be present at the time of the registration, whatever might have been the position at the actual time of the marriage. Thus if a Hindu marries for the second time during the life time of the first wife and if the first wife dies thereafter, there will be no bar to get the second marriage registered according to this Act. Section 15 (b).

70. This condition is necessary only to give jurisdiction for the Marriage Officer to take action for the purpose of registration. Section 8.

absence in Hindu law. Marriage in this system connoted, as it has already been seen, an indissoluble union to be continued even after death. It is on the fiction of this indissoluble marriage-tie that a Hindu wife was entitled to maintenance even in cases when the husband embraced a different faith, inconsistent with and hostile to the prevailing religious feeling of the wife. In this respect, Hindu law could be contrasted with other systems of law in general and Roman and English laws in particular. There is, however, an indication in a śloka of Vaśiṣṭha that divorce among the Hindus also might have existed though not in a very pronounced form. The text of Vaśiṣṭha runs thus :

"Sa tu yadanyajātīyaḥ patitaḥ klīva eva vā
Vikarmastha sagtro vā dāso dīrghāmayopi vā
Ūḍhāpi deyā sānyasmai saprāvaraṇabhūṣaṇā."

What Vaśiṣṭha means is that a girl, even though she is once given in marriage, should be got married for the second time, if the first groom happens to be a slave, an outcaste, or one belonging to the same gotra or a different caste or suffering from a disease[71] for a long time. If a girl, already married to a man, is given in marriage to another man for the second time, in that case the first husband may be regarded to have been divorced. The very conception of a punarbhū woman also indicates the existence of divorce. But a strictly legal divorce or dissolution of marriage is a business exclusively confined to the husband and the wife. But according to the provision, made by Vaśiṣṭha, it seems that the father or the guardian of the girl rather than the girl herself was responsible in getting the first husband abandoned by the girl. Hence such a case of desertion can by no means be called a legal divorce. And as a matter of fact, we do not know at whose instance or initiative a punarbhū woman was to discard or be separated from her first husband. Again, if a Hindu wife misconducts herself with a man of a lower class, she is to be discarded but not to be divorced in the literal sense of the term. Even in that case the unchaste wife is entitled atleast to a starving maintenance. This provision for starving maintenance sufficiently indicates that the marriage-tie could never be dissolved, though the wife was to live separately from her husband. Such provisions also are not wanting in the Śāstras that if the wife repents after her misconduct and performs the necessary expiatory rites, there is no reason why she should not be again accepted as a wife

71. According to Viṣṇu, the hunchback, dwarf, one in distress or afficted with a disease should abstain from marriage for life :

"Kubjavāmanajātyandhaklīvapangvārtarogīnām
Vratacaryyā bhavetteṣām yāvajjīvamasaṃśayam"

capable of taking part in all the duties of a Hindu wife according to the Śāstras. On this point, of course, there is some difference of opinion among the different High Courts. According to the Calcutta High Court[72] an unchaste wife is not entitled even to a starving maintenance, the rules to that effect being of moral obligation only. The Madras[73] and the Allahabad High Courts[74] also are of the same opinion. But it has been held in a Bombay[75] case that an unchaste wife is entitled to bare maintenance and if she repents and performs the expiatory ceremonies she is entitled to all the rights of a wife, unless she has misconducted herself with a man of lower class. The observation of Candavarkar, J. on this point is very instructive.[76] Though essentially a sacrament, the conception of Hindu marriage gave rise to certain anomalies ; it was by no means impartial to the husband and wife. Thus though a Hindu husband could take any number of wives, a wife was never allowed to take a second husband either during the life time or after the death of the first husband. There was in this sense a long-slanding injustice on the part of the Hindu wife. No doubt, some legislations were passed to ameliorate the conditions of the wife by passing the Hindu Widow Remarriage Act of 1856 and the Hindu Married Women's Right to Separate Residence and Maintenance Act (XIX) of 1946. The former Act legalises the remarriages of Hindu widows and the latter Act which has been repealed by the Act (LXXVIII) of 1956 provided *inter alia* that if a husband married for another time, the former wife would be entitled to judicial separation and maintenance. This law was enacted to discourage polygamy in Hindu law. But the husband could never seek judicial separation from the wife under this Act. Thus though the original Hindu law was partial to the husband, the Act of 1946 (XIX) had been partial to the wife. In any way, the question of

72. Ramanath V Rajanimani, 17 Cal. 674.

73. Nagamma V Virabhadra, 17 Mad. 392.

74. Debisaran V Daulata, 39 Mad. 234.

75. Parami V Mahadevi, 34 Bom. 278.

76. "The general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by a husband. If she is leading an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment, just sufficient to support life ; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rites, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation she can claim no more than bare maintenance. But if on the other hand she is leading a vicious life without any indication that she has repented, she is not entitled to maintenance."

According to the Madras High Court also, an unchaste wife is entitled to bare maintenance, if she subsequently leads a chaste life. (Satyabhama V Keshav, 39 Mad. 658).

divorce had become quite prominent for Hindu law. Though no form of marriage can be advocated to be the only ideal form,[77] still there is hardly any doubt that the law must provide in suitable cases for dissolution of marriage and declaration of nullity of marriage in the clearest possible language. The Rau Committee, the Hindu Code Bill, the Hindu Marriage Act (XXV of 1955) and the Special Marriage Act of 1954 made provisions for nullity of marriage, dissolution of marriage and the judicial separation of husband and wife. The grounds which were enumerated in section[78] 2 of the Act XIX of 1946 for claiming separate residence and maintenance are very significant; these are more or less the grounds which have been considered in connection with the divorce law, as suggested in the Hindu Code Bill, the Hindu Marriage Act 1955 and the Special Marriage Act of 1954. The other Acts which had already modified the orthodox conception of Hindu marriage were the Hindu Marriage Disabilities Removal Act (XXVIII) of 1946 and the Hindu Marriages Validity Act (XXI) of 1949

77. There was a storm of protest by the orthodox section that the doctrine of divorce should never be introduced in Hindu law. It is undoubtedly true that any discussion on the desirability of such a legislation is sure to warrant and involve questions which are more social than legal on account of the peculiarity of the institution of the joint family system, the sanctity attached to the Hindu marriage from time immemorial and also the characteristics of the religious sentiments permeating the minds of the Hindus. But as it has been said before, questions like the supposed equality of sexes and dissolution of marriage are almost eternal and cannot be answered by simple 'yes' or 'no.' And there also cannot be any ideal institution of marriage which must be accepted and followed by everybody. The nature and form are virtually determined by the circumstances of each country or people.

78. It ran as follows :

Grounds for claiming separate residence and maintenance : Notwithstanding any custom or law to the contrary, a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the following grounds namely :

(1) if he is suffering from any loathsome disease not contracted from her ;

(2) if he is guilty of such cruelty towards her as renders it unsafe or undesirable for her to live with him ;

(3) if he is guilty of desertion, that is to say, of abandoning her without her consent or against her wish ;

(4) if he marries again ;

(5) if he ceases to be a Hindu by conversion to another religion ;

(6) if he keeps a concubine in his house or habitually resides with a concubine ;

(7) for any other justifiable cause ;

Provided that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband, if she is unchaste or ceases to be a Hindu by change to another religion or fails without sufficient cause to comply with a decree of a competent court for the restitution of conjugal rights."

which have been repealed by the Hindu Marriage Act (XXV) of 1955. The latter Act[79] enacted, that the word Hindu included persons professing the Sikh or Jain religionand the former Act removed the restriction of gotra and pravara in Hindumarriage and also validated the marriage between the subdivisions of the same caste.

9. Gotra in Hindu law

Before the passing of the Act XXVIII of 1946,[80] gotra played a very important part in Hindu law in determining the legal validity of a marriage. Thus Manu says that a woman belonging to the same gotra or primitive stock is prohibited to be taken in marriage by a man of any of the three regenerate classes :

"Asapiṇḍā yā ca māturasagotrā ca yā pituḥ
Sā praśastā dvijātīnām dārakarmaṇi maithune."

From the word praśastā, used in the above śloka, it might appear that the gotra rules were only recommendatory rather than mandatory ; but it came to be the almost established law that the question of gotra like that of the prohibited degrees was legal and not simply moral. Baudhāyana also says that he who inadvertently marries a girl sprung from the same original stock with himself must support her as a mother.[81] Vaśiṣṭha goes further and says that if the husband is of the selfsame gotra, the girl even though she had been married, should be given to another husband, decked with clothes and ornaments. The question of prohibited degrees and the exception thereto in the form of what is known as the intervention of three gotras have been fully discussed by Dr. Banerjee, in his monumental work.[82] The exception, referred to above, is based on the texts of Brihat Manu and the Matsya Purāṇa, cited by Raghunandana in his Udbāhatattva though S'ūlapāṇi differs from him.

Persons are said to be of the same gotra[82] when they can trace their origin to the same Ṛiṣi. Gotra thus means a family descended from one of the several patriarchs who according to some are twenty four and according to some others forty two in number. Brahmins alone have

79. Section 3 of this Act ran as follows :
"Validity of marriage between Hindus : Notwithstanding anything contained in any other law for the time being in force or in any text, rule or interpretation of Hindu law or in any custom or usage, no marriage between Hindu shall be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to different religions, castes, sub-castes or sect."

80. This Act applied to the whole of India except the erstwhile part B states.

81. Colebrooke's Digest, Book V.

82. Marriage and Stridhana, p. 63 *et seq.*

gotras, others follow the gotra[83] of their preceptors. The Śūdras were not bound by the restrictions of gotra.

The reasons for prohibiting sa-gotra marriages are exactly the same as those for the origin of exogamy according to McLennan.[84] Several reasons have been assigned for the origin of exogamy. Thus attraction for the foreign or unfamiliar has been enumerated as one of the reasons of exogamy.[85] Besides the scientists and the doctors clearly see the evil effects of in-breeding.[86] In Hadith it is said, "Marry among strangers and you will not have feeble posterity." It it also said that[87] "the seed of relations brings forth feeble[88] fruit."

10. Sacramental marriage *versus* civil or special marriage

Originally, for obvious reasons, there was mainly one form of marriage in Hindu law ; that was the sacramental form. But after the advent of the Britishers, that alone was not deemed sufficient, as many special or irregular froms of marriage were actually taking place in clear disregard of the provisions of the orthodox Hindu law and tradition—mainly on account of the contaminations of certain social and cultural ideas. This fact could not be ignored ; hence there was the imperative

83. The word gotra has been derived thus : Go—trai+ka. Gotrabhūgavyayargotraḥ s'aile gotraṃ kulākhayoḥ iti Medinī. In this sense it has got some connection with the meaning suggested by Max Müller who thinks that the word gotra comes from the word 'go' or cow and he traces the connection between gotra and cow in this way : "In ancient times, when most wars were carried on not to maintain the balance of power of Asia or Europe but to take possession of good pasture or to appropriate large herds of cattle, the hurdles grew naturally into the walls of fortresses, the hedges became strong holds......... and those who lived behind the same walls were called gotra, a family, a tribe or race." (Chips from a German Workshop, Vol. II, p. 28).

84. Primitive Marriage, pp. 84--86

85. Vinogradoff, Historical Jurisprudence, Vol. I, p. 180.

86. *Ibid.* p. 181.

87. Goldziher -- in the Academy, XVIII (1880) p, 26.

88. Avoidance of conflicts in the same tribe or family between fathers and sons, between brothers and other relations has been regarded as another reason of exogamy. Another motive for exogamy might be traced to the strong human desire for matrimonial alliances for the purpose of attacking and repelling enemies (Cf. Kohler, Philosophy of Law and Sen Gupta, Evolution of Law, p. 52).

The ethical and moral considerations also played a very considerable part. The Hindu sages prohibited sa-gotra marriages, as they were grotesque in the sense that both the parties belonged to the same family -- so to say -- however remotely they might be related. The disadvantage of this gotra doctrine is that the scope of selecting parties to marriage is thus narrowed down.

necesssity[89] of an Act like the Special Marriage Act (III of 1872). These marriages were special or civil and were more in the form of exceptions rather than general rules. The questions of religion, caste, prohibited degrees and number of parties to the marriage had to be viewed specially for the validity[90] of such marriages under the Special Marriage Act of 1872.

The original Hindu law did not mention civil marriage and the Special Marriage Act (1872) did not refer to sacramental marriages; but both of them had been prescribed and detailed by the Hindu Code Bill. This was thus the first legislative classification[91] of marriage on the basis of sacrament and speciality. But the peculiarity is that before the Hindu Code Bill and its fragments, since passed into Acts, the original sacramental from of marriage was not disturbed in any way; that form remained in tact; only a new form of marriage was devised, or more correctly speaking, recognised, as necessitated by the circumstances of the country and the conditions of the society. To this naturally there was not and could not be any serious objection, as the orthodox fold was not invaded in any way. Those who wanted to go out of the orthodox fold were simply given a sort of legal recognition to do so.

The conditions of the civil marriage of the Hindu Code Bill were obviously taken essentially from the Special Marriage Act. But it did not stop there. It also went far to give a new definition to sacramental marriage by enumerating such conditions as would make the sacramental marriage also appear, to a very large extent, as analogous to or identical with, the civil marriage. Thus monogamy[92] was insisted upon and the

89. For the report of the Select Committee, vide Gazette of India, 1871, Part V. p. 519 and for discussions in the Council vide *Ibid.* 1868, Supplement. pp, 890, Extra Supplement, pp. 16, 42, 1872. Supplement, pp. 2, 57, 193, 261.

90. One of the most essential conditions of the special marriages was that the parties to such marriages do not profess the Christian, Jewish, Hindu, Muhamadan, Parsi, Buddhist, Sikh or Jaina religion. This was according to the original Act of 1872. But this condition had been amended by the Act (XXX) of 1923. The original preamble ran like this: "Whereas it is expedient to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Muhamadan, Parsi, Buddhist, Sikh or Jaina religion and to legalise certain marriages that the validity of which is doubtful ...." After the amendment of 1923, the words "and for persons who profess the Hindu, Buddhist Sikh or Jaina religion" had to be added; vide section *2*. The Special Marriage Act of 1872, as amended by the Act of 1923 has been repealed and replaced by the Special Marriage Act (XLIII) of 1954.

91. Section 6 of the Hindu Code Bill provided that save as otherwise provided herein no marriage between Hindus should be recognised as valid unless it was solemnised either as a sacramental marriage or as a civil marriage.

92. "Neither party has a spouse living at the time of the marriage." Section 7 (1) of the Hindu Code Bill.

conceptions of Sapiṇḍa[93] and prohibited relationship[94] were substantially modified. In this way the original institution of Hindu marriage was sought to be fundamentally re-oriented in the most unorthodox fashion. A mere glance at the conditions that had been enumerated in relation to the sacramental marriage and the civil marriage by sections 7 and 10 respectively of the Hindu Code Bill would amply justify the truth of the above assertions. Hence there was a storm of protest against the Hindu Code Bill, but its fragments have become laws nevertheless.

Reference has already been made to the development and fate of the Hindu Code Bill at the very outset of this chapter. When the idea of passing the whole Hindu Code Bill in its entirety was apparently given up, recourse was taken to the different fragments. The Special Marriage Act of 1954 repeals Act III of 1872. Naturally it had been made sufficiently comprehensive to replace Act III of 1872 as well as to give some scope to the provisions of the Hindu Code Bill in an indirect mode. The present Act of 1954 and the civil marriage of the Hindu Code Bill readily betray some very essential points of similarity. This will be corroborated also by the statement of objects and reasons[95] of the Special Marriage Bill. The Act of 1954 is not necessarily confined to the Hindus alone. As a

93. "Sapiṇḍa relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother and the fifth (inclusive) in the line of ascent through the father, the line being traced up wards in each case from the persons concerned who is to be counted as the first generation." But Yājñavalkya says—"Pancamātsaptamāt ūrddhvaṃ mātritaḥ pitritastathā."

94. "Two persons are said to be within the degrees of prohibited relationship, if one is lineal ascendant of the other or was the wife or husband of a lineal ascendant or descendant of the other or if two are brother and sister, uncle and niece, aunt and nephew or children of two brothers or of two sisters." For other details vide section 5 of the Hindu Code Bill.

95. "This Bill revises and seeks to replace the Special Marriage Act of 1872 so as to provide a special form of marriage which can be taken advantage of by any person in India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess. The parties may observe any ceremonies for the solemnisation of their marriage, but certain formalities are prescribed before the marriage can be registered by the Marriage Officer. For the benefits of Indian citizens abroad, the Bill provides for the appointment of Diplomatic and Consular Officer as Marriage Officers for solemnising and registering marriage between citizens of India in a foreign country.

(2) Provision was also sought to be made for permitting persons who are already married under other forms of marriage to register their marriages under this Act and thereby avail themselves of these provisions.

(3) The Bill was drafted generally on the lines of the Special Marriage Act of 1872 and the notes and clauses attached hereto explain some of the changes made in the Bill in greater detail."

For Notes and Clauses vide p. 12 of the Bill.

matter of fact, it is independent of religion. The mere absence of this religious element can by no means be regarded as a sufficiently promising step in inaugurating uniformity of civil code in the whole of India as contemplated by Article 44 of the constitution of India. The reasons therefor have already been examined towards the beginning of the present chapter.

If we compare and scrutinise the provisions of the Hindu Code Bill, the Special Marriage Act of 1954 and the Hindu Marriage Act 1955, we can clearly see that the main purposes of all these measures contemplated, were to amend the character of the institution of Hindu marriage and apply the rules of nullity, dissolution of marriage and judicial separation etc. which were recognised only in civil marriages.

In this connection, the most essential points are with special reference to (1) the conditions of marriage, (2) nullity of marriage, (3) dissolution of marriage and (4) judicial separation.

There was hardly any justification for disturbing the sacramental marriage. It might remain as it was, based upon texts and customs, followed scrupulously by the great majority of the people from time immemorial. Those who were not satisfied with its conditions and consequences were quite at liberty to take recourse to the form of civil marriage. Civil marriage also might remain only permissive—pure and simple.

There might, of course, be certain cases where some legislation on the lines provided might be necessary. But these cases would not be covering a very large scope to require a general legislation to affect the entire population in face of vehement opposition and protest. Thus strictly speaking, at the last analysis, only Hindu wives required some means to get rid of the marriage-tie by getting it dissolved. The husband did not require such help. He could easily marry another wife even inspite of the subsistence of the former marriage or protest of the wife. If a wife required to be married again, she required the dissolution of the former marriage. Hence there might be some justification for dissolution of a marriage obviously more for the wife than for the husband. Already married couples again were the only persons who were in need of provision for dissolution of marriage. There was no such necessity for parties who were merely intending to enter into a marriage *vin culum* with contemplation of future divorce in case of necessity, if at all; such parties had at their disposal the civil marriage according to the Act of 1872 or the Act of 1954. As a matter of fact, one of the most important arguments of the advocates of the Hindu Code Bill and its fragments was to have legal provision for wives to get their marriages with undesirable husbands

dissolved. Hence there was hardly any justification for the too comprehensive Hindu Code Bill or its fragments in the form in which they have been passed into law. A piece-meal legislation[96] could suffice, if it provided that under certain conditions the marriage-tie would be dissolved—whatever the form of the marriage might have been—and that the wife would be entitled to marry again if she so desired. The conditions might be more or less on the lines of those as in cases of nullity of marriage, dissolution of marriage and judicial separation. It does not necessarily mean that the provisions of divorce would be frequently utilised specially by the Hindu women. This is at least what is seen from the Hindu Widows' Re-marriage Act. No special provision for making a marriage voidable was essential. The distinction between void and voidable or invalid marriage, as contemplated by the Hindu Code Bill or the fragments should have been avoided. The provision to make impotence sufficient only for declaring a marriage voidable is absolutely meaningless.

Judicial separation again does not ultimately serve any very useful purpose, as it is not an end in itself—it is simply a means. The Hindu Code Bill had to provide expressly that dissolution could be had even after judicial separation had been obtained first. The wife (Hindu) had already got some rights in the nature of judicial separation.[97] But judicial separation does not dissolve the marriage and hence the wife cannot marry again. The husband did not require any judicial separation for the purpose of further marriage. So in this case also judicial separation alone would not ultimately help the wife, unless she is absolved from the obligation of marriage[98]—a fact which alone can entitle her to contract a fresh marriage, if desired by her at all. Judicial separation in itself alone will lead to unnecessary complication, unless the wife deems it as the end.

Thus it might be quite possible and advisable to have abandoned these controversial measures and enact only one law which in appropriate

96. "We think that there is a certain amount of unfounded prejudice against what is usually called piece-meal legislation......It is piece-meal compared with the totality of the laws but they may be quite exhaustive so far as that particular topic or branch of laws is concerned. In such a partial legislation, however, care must be taken to see that it is not a misfit with the rest of the law......." Written statement of late Dr. B. K. Mukherjee, the Chief Justice of India and others, submitted to the Hindu Law Committee.

97. Vide Act XIX of 1946, since repealed by the Act (LXXVIII) of 1956.

98. If there is any divorce law, it will also help the husband in dissolving the marrriage-tie which will absolve him from the legal responsibility of maintaining the wife any further.

cases might give rights to the wife to get rid of the marriage-tie with an undesirable husband—whatever might be the reason, be it disease, bad character, cruelty, crime or disagreement in general. This might be done also by a suitable amendment of the Special Marriage Act of 1872. But there is no justification either, why Hindus marrying under the Special Marriage Act 1954 should be severed from the Hindu joint family or the coparcenary. The provisions of the Special Marriage Act 1954, do not seriously interfere with the Hindu society, as it is not the general law for the whole community of the Hindus. This Act has been rightly made simply permissive and not compulsorily applicable to any community in India.

It does not require any great reflection to understand that social reforms cannot and should not be enforced upon a community by a compulsory legislation, in as much as, legislation is not the fit instrument of social reform except to a very restricted extent. The changes should always come from within, following a process of natural evolution; they should never be imposed by external authority. The golden rule thus should be to hasten slowly according to social needs and adjustments. Over and above the general criticisms, levelled against the character and scope of the Hindu Code Bill and its fragments, there are many points in details which are evidently quite unsatisfactory. Reference may be made in this connection to the time-limit[99] for presenting petition for dissolution of marriage on the doctrine of "fair trial"[100] in marriage. Again as between the Hindu Code Bill and the Hindu Marriage Act, it must be said that the latter evinces some instances of better draftsmanship. Thus the grounds of nullity for a sacramental or civil marriage of the former Bill have been enumerated also as the grounds of dissolution of marriage according to the latter Act; the provision for making a marriage valid by subsequent registration though it was within prohibited sapiṇḍa-relationship has been rightly deleted from the Hindu Marriage Act, 1955 which also provides, following the English Law, that no adjudication of court will be necessary for the declaration of the nullity of a void marriage. In view of the passing of the Special Marriage Act, 1954, all references to civil marriage have been deleted from the Hindu Marriage Act, 1955.

99. According to the Hindu Code Bill it was three years; according to the Hindu Marriage Act also it has been the same.

100. Three years as a period for fair trial for a marriage will atonce appear to be too long. Specially this will conflict with the right to have dissolutton of marriage after only two years of judicial separation which does not require any time restriction.

Regarding the Hindu Marriage and Divorce Bill which was the first fragment of the "lapsed Hindu Code", the Law Minister said in the Council of State that from the opinion received during its circulation, there appeared to be a large measure of support for it. Fifteen State governments had given general support while eight had expressed no opinion. U. P. and Bihar were for prevention of polygamy but did not want introduction of divorce in the legislation. Assam and Ajmer said that the time was not ripe for the undertaking of the measure. The Law Minister further observed that while abolishing caste restrictions, enforcing monogamy and providing for divorce, the measure gave Hindus the liberty to lead the kind of life which they wished to live without infringing the similar liberty of those who preferred to adhere to orthodox ways. Divorce was no innovation, as there were several Hindu communities amongst whom there was customary divorce.

11. The fragments of the Hindu Code Bill that have become Acts

As it has been seen earlier, the Hindu Code Bill, for reasons already explained, was split up into four fragments which have now become the Acts of the Indian Parliament. They are the Hindu Marriage Act (XXV) of 1955; the Hindu Succession Act (XXX) of 1956; the Hindu Minority and Guardianship Act (XXXII) of 1956 and the Hindu Adoptions and Maintenance Act (LXXVIII) of 1956. All these fragmentary Acts, having been inspired by and derived from the Hindu Code Bill were more or less subject to vehement criticism and protest on account of their revolutionary provisions not in consonance with the orthodox sentiments of the Hindus. Almost identical provisions have been made by all the four Acts, referred to above, with respect to the subjects covered by them in common. Thus the definitions of the words like "Hindu," "custom and usage" and the over-riding effects have been more or less the same in all the different Acts.

The most vehement criticisms were directed against the provisions of the first two Acts, namely, the Hindu Marriage Act and the Hindu Succession Act. The other two Acts did not evoke so much criticism and as a matter of fact, the last Act, namely, the Hindu Adoptions and Maintenance Act was the least offensive and the most liberal one—re-introducing, among other things, the adoption of daughters, exactly on the analogy of adoption of sons. The law of adoption has been simplified, rationalised, liberalised and made uniform.

All the above fragmentary Acts were passed "to amend and codify" the relative portions of Hindu law. By amendment, the changes—mostly revolutionary—were introduced and by codification the law was given a

statutary clarification, definition and exactitude. As it is not feasible to indulge in any detailed discussion about the different Acts, only passing references to their salient features will be made herein. Broad criticisms have already been offered.

12. The Hindu Marriage Act (XXV) of 1955

This Act extends to the whole of India except the state of Jammu and Kashmir and the members of the Scheduled Tribe within the meaning of clause 25 of Article 366 of the constitution. It applies to any person who is a Hindu by religion, in any of its forms and also to a Buddhist, Jaina or Sikh whose status has been further clarified by an explanation from the stand points of parentage and conversion as well as re-conversion. The term Hindu will not mean only those who are Hindus by religion, but will include any person to whom this Act will apply. Certain terms have been clearly defined ; of them the most important are custom, usage and sapiṇḍa relationship. The over-riding effect of the Act has been very clearly stated, in as much as, this alone will give the revolutionary character to the Act. Conditions of marriage have been enumerated in section 5. Contravention of some of these conditions has been made punishable with fine or simple imprisonment or with both. Bigamy among the Hindus after the passing of this Act will be punishable under sections 494 and 495 I. P. C. As regards guardianship in marriage, the persons who are entitled to give their consent for the bride have been enumerated with the order specified. A Hindu marriage now may be solemnised in accordance with the customary rites and ceremonies of any of the parties ; and if the ceremony of Saptapadi is at all observed, the marriage will be completed and binding, when the 7th step will be taken. Registration of a Hindu marriage has been made simply evidentiary and not compulsory. The laws for restitution of conjugal rights and judicial separation have been provided for by section 9 and 10 of the Hindu Marriage Act. Nothing can be pleaded in answer to a petition for the restitution of conjugal rights which shall not be a ground for judicial separation, nullity of marriage or divorce. For judicial separation, six grounds have been enumerated, whereas three and nine grounds have been enumerated for voidable marriage and divorce respectively. A Hindu marriage will be null and void, if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5. These are the most revolutionary provisions in the law of marriage. According to the Śastras, Hindu marriage was indissoluble—once a marriage always a marriage. Dissolution of the sacred tie of the Hindu marriage has been criticised as most revolting. The grounds of nullity, divorce and judicial separation have been enumerated taking into consideration all the social and economic conditions of the present time. The criticism is not so much

against the details of the above grounds as against the fundamental conceptions of the secularity and dissolubility of the Hindu marriage. No petition for divorce can be presented within three years of the marriage and the divorced persons can marry again after the expiry of the statutory periods. Provisions also had to be made for the legitimacy of children of void and voidable marriage and also for the custody, maintenance and education of children, whenever there is any legal proceeding under the Hindu Marriage Act. The jurisdiction of and the procedure to be followed by the courts have been provided for by sections 19 to 28. Proceedings under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter relating to such proceeding except with the previous permission of the court. The contravention of this latter provision shall be punishable with fine which may extend to Rs. 1000/-. Provisions for maintenance *pendente lite* and expenses of legal proceedings have been contained in section 24, whereas sections 25 and 26 provide for the permanent alimony and maintenance as well as the disposal of property. Four savinges have been enumerated by section 29 and the Acts to be repealed have been enumerated by section 30.

13. **The Hindu Succession Act (XXX) of 1956**

As regards its extent, application, definition and interpretation as well as over-riding effect, this Act also is almost co-extensive with the Hindu Marriage Act. The additional terms that have been defined in the Act are "Marumakkattayam law," "Aliyasantann law" and "Nambudri law." This Act shall not apply to certain properties, such as, the property regulated by the Indian Succession Act (XXXIX of 1925), some of the impartible states and the Valiamma Thampuram Estate and the Palace Fund.

When a male Hindu dies leaving interest in a Mitākṣarā coparcenary property, his interest in the property shall devolve by survivorship, provided that if the deceased had left surviving him a female specified in class I of the Schedule or a male relative specified in that class who claims through such female relatives, the interest of the deceased in the Mitākṣarā coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship. Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru or illom will be governed by this Act and not by the Marumakkattayam, Aliyasantana or the Nambudri laws.

The general rules of succession in the case of males have been given by section 8 and the order of succession among heirs in the Schedule has been specified in section 9. The distribution of property among heirs in class I of the Schedule has to take place according to the four rules contained in

section 10. The distribution of property among heirs in class II of the Schedule in anyone entry is to take place in such a way that they share equally. The order of succession among the agnates and the cognates shall take place according to the three rules enumerated by section 12. Degrees of ascent and descent shall be computed inclusive of the intestate.

The most important provision has been made by section 14 according to which any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. The Strīdhana property also will continue to be her absolute state. But nothing contained in sub-section (1) of section 14 shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property. The provision of section 14 was made obviously to equalise the proprietory status of men and women. This was already achieved in case of succession of a male intestate by the provisions made by sections 9 and 10. The general rules of successions and the order of succession and the manner of distribution among the heirs of a female Hindu have been provided for by sections 15 and 16 of the Act. Some special provisions respecting persons governed by the Marumakkattayan and Aliyasantana laws have been made by section 17. According to the general provision relating to succession, full blood is preferred to half blood and if two or more heirs succeed together to the property of an intestate, they shall take the property, save as otherwise expressly provided in this Act, *per capita* and not *per stirpes* and as tenants-in-common and not as joint-tenants. A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit as if he or she was born before the death of the intestate.

In case where two persons have died rendering uncertain as to who died later, the presumption shall be that the younger survived the elder. Some pre-emptory rights have been recognised in behalf of the heirs specified in class I of the schedule with respect to an interest in any immovable property or in any business carried on by the intestate alone or in conjunction with others. Other details regarding the exercise of this right of pre-emption have been provided for by clauses 2 and 3 of section 22. Special provision has been made for the use and partition of dwelling houses. Thus where the female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried, or has been separated from her husband or is a widow. Re-marrying widows, converts and murderers have been disqualified from inheriting property according to

the Hindu Succession Act. If any person is disqualified from inheriting any property under this Act, the property shall devolve as if such person had died before the intestate. No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity. In view of this general provision, the Hindu Law of Inheritance (Amendment) Act (II) of 1929 has been rendered redundant and as such repealed. Similarly in view of the new rights given to women in general, the Hindu Women's Right to Property Act (XVIII) of 1937 is no longer necessary and hence it has also been repealed. In case of failure of heirs, the property will devolve on the Government, subject to all liabilities and obligations.

Any Hindu may dispose of by will or other testamentary disposition any property including the interest in a Mitākṣarā coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru. It has also been expressly provided that the testamentary deprivation of a share in the property shall not affect the right of maintenance of any heir specified in the Schedule. This has also been re-affirmed by the Hindu Adoptions and Maintenance Act which has repealed this portion of the Succession Act.

14. The Hindu Minority and Guardianship Act (XXXII) of 1956

The extent, application, definitions and the over-riding effect of this Act also have been made almost co-extensive with the provisions of the two preceding Acts. The provisions of this Act shall be in addition to and not, save as herein after expressly provided, in derogation of the Guardians and Wards Act, (VIII) of 1890. "Minor" has been defined as a person who has not completed the age of 18 years. The Guardians may be either a natural guardian, a guardian appointed by the will of the minor's father or mother, a guardian appointed or declared by a court or a person empowered to act as such by or under any enactment relating to any court of wards. The natural guardians have been enumerated by section 6 and their powers by section 8. The natural guardianship of a minor adopted son shall pass to the adoptive father and after his death to the adoptive mother. Testamentary guardians and their powers have been enumerated by section 9. A minor shall not be competent to act as the guardian of property of another minor. A *de facto* guardian shall not be competent to deal with a minor's property. In a joint family property no guardian can be appointed for minor's undivided interest therein by any other court except the High Court. In appointment of guardians by court, the welfare of the minor shall be the paramount consideration.

15. The Hindu Adoptions and Maitenance Act (LXXVIII) of 1956

The provisions of this Act also, as usual are almost entirely co-extensive with the other preceding Acts, regarding extent, application, definitions and over-riding effects. All adoptions made after the passing of this Act must be according to the provisions of this Act, otherwise they will be void and will not affect the status and the rights and duties of the so-called adopted child The validity of adoption has got to be examined from four stand-points : (1) the capacity to take in adoption; (2) the capacity to give in adoption; (3) the capacity of being adopted and lastly (4) the fulfilment of certain other conditions.

Any Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. The right to adopt exists only when the adoptive person has no Hindu son or daughter as the case may be. Adoption of daughter is a special provision of this Act. Though originally daughters also could be adopted in as many different ways as sons, still, the practice of adopting daughters came to be discontinued. This question has been elaborately discussed before (vide section 15 (k) of chapter XIV, ante). The consent of the wife if she is capable of giving it, is necessary for the adoption to be made by the husband. If a man has more than one wife the consent of all the wives is necessary, unless any one of them is incapable of giving such consent. A wife who is of unsound mind or a minor is incapable of giving any consent. A new provision also has been made whereby any female Hindu who is of a sound mind and not a minor can adopt a son or a daughter. This provision over-rides the different laws prevailing in the different provinces regarding adoption by widows. A father, a mother or a guardian alone can give a child in adoption. Here also the previously existing law has been considerably widened. Before the passing of the Act, only the parents could give a son in adoption on the authority of a text of Manu. A father alone can give a child in adoption only with the consent of the mother. The mother can give in adoption only when the father is dead or otherwise disqualified from exercising such a right. In absence of the parent (not necessarily after their death), the guardian can give a child in adoption. An adopted child cannot be given in adoption again by the adoptive parents or any body else. To be capable of being adopted, the child must be a Hindu, it must not have been already adopted, must not have completed the 15th year or been married unless there is a custom to the contrary.

Other conditions have been enumerated in section 11. The adoptive

parents must not have any Hindu child. The existence of grand-children and great-grand-children is no bar. The same child can not be adopted simultaneously by two or more persons. Actual giving and taking must take place, though the performance of Datta Homa shall not be essential for the validity of adoption. After the adoption, the child shall be deemed to be a child of the adoptive family and its ties with the natural family will be severed subject to certain restrictions. In the first place, the adopted child shall not be competent to marry a party whom it could not marry if the adoption had not taken place. In the second place, if any property has vested in a child, later on given on adoption, the property shall continue to vest in such a person, subject to the obligations of maintenance etc. An adopted child also can not divest any person of any property which had already vested in him or her before the adoption. Subject to any agreement to the contrary, an adoption does not deprive the adoptive parents of their power to dispose of their property by transfer *inter vivos* or by will. When a Hindu adopts a child, when his wife is living, that wife will be regarded as the adoptive mother. When the consent of more wives than one has been obtained for adoption, only the senior-most will be the adoptive mother. The rest will be regarded as step-mother. Again where a widower or a bachelor adopts a child and then takes a wife, such a wife will be regarded as the step-mother of the adopted child. Where a widow or a spinster adopts a child, any husband whom she marries subsequently will be regarded as the step-father of the adopted child. No valid adoption can be cancelled by any body including the adoptive parents and the adopted child. On the production of a registered document, purporting to record an adoption, the court shall presume that the adoption has been in accordance with the provisions of this Act. Payment or agreement to pay as consideration for adoption shall be punishable with imprisonment which may extend to six months or with fine or with both.

The law regarding maintenance is mostly the codification of what was more or less prevailing at the time of the passing of this Act. A Hindu wife is entitled to life-long maintenance by the husband provided she lives with him except under the circumstances mentioned in the proviso to section 18 (2). A widowed daughter-in-law is to be maintained by her father-in-law. Aged parents and minor children have to be maintained by a Hindu. Children, legitimate or illegitimate, can claim maintenance only so long as they are minor. Unmarried daughters are entitled to maintenance so long as they remain un-married. The dependants have been enumerated as 9 in number by section 21 of the Act. The heirs of a deceased Hindus are bound to maintain the dependants of the deceased out of the estate inherited by

them from the deceased. It has been specifically provided that where a dependant has not obtained by testamentary or intestate succession any share in the estate of a Hindu, dying after the commencement of this Act, the dependants shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate. The amount of maintenance shall be determined at the discretion of the court after taking into consideration the position and status of the parties, among other conditions, enumerated by section 23 (2), (3). The amount of maintenance, though once fixed by the court or by agreement, can be altered in materially changed contexts. Debts of every description shall have priority over the claims of his dependants for maintenance under this Act. A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased unless created by the will of the deceased, a decree of court or an agreement between the dependant and the owner of the state. When a dependant has a right to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee, unless the transfer is for consideration and without notice of the right of maintenance.

The Hindu Married Women's Right to Separate Residence and Maintenance Act (1946) and sub-section 2 of the section 30 of the Hindu Succession Act of 1956 have been repealed.

Nothing of this Act shall apply to an adoption taking place before the passing of this Act,

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